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IN THE

Supreme Court of the United States

October Term, 1966

No. 725

EUGENE J. KEOGH,

Petitioner,

against

THE WASHINGTON POST CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Eugene J. Keogh, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on July 28, 1966, which reversed an order of the United States District Court for the District of Columbia denying the respondent's motion for summary judgment.

Opinions Below

The first opinion of the District Court (109-110)* is not reported and is printed in Appendix B hereto, *infra*, pp. 2a-3a. The second opinion of the District Court (112-118) is reported in 244 F. Supp. 482 and is printed

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* Parenthetical numerical references, unless otherwise specified, are to pages of the Joint Appendix in the Court of Appeals.

in Appendix C hereto, *infra,* pp. 4a-11a. The opinion of the Court of Appeals for the District of Columbia Circuit, printed in Appendix D hereto, *infra,* pp. 12a-32a, is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 28, 1966 (Appendix E hereto, *infra,* pp. 33a-34a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions and Statutes Involved

Involved herein are Amendment I and Amendment XIV, Sec. 1 to the United States Constitution, the texts of which are reprinted in Appendix A, *infra,* p. 1a.

Questions Presented

1. Whether a newspaper's publication of a syndicated columnist's article, falsely charging a member of the United States Congress with the commission of various crimes and the dereliction of his duty, without the publisher having any knowledge upon which to base a judgment regarding the truth of the charges, is sufficient evidence of reckless disregard as to whether the articles were false or not, to defeat publisher's motion for summary judgment under the principles of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964).

2. Whether, on newspaper's motion for summary judgment in a libel action brought by a public official against the newspaper which published a syndicated column charging him with various crimes and the dereliction of duty, the official's affidavit, setting forth facts respecting the columnist's reputation for false reporting and his published

admissions of same, is admissible evidence bearing upon the publisher's reckless disregard for the truth or falsity of the publication, under the principles enunciated in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964).

Statement of the Case

The petitioner, Eugene J. Keogh, who has been a Congressman for more than a quarter of a century, brings this suit against Drew Pearson and The Washington Post Company for libel. The libels sued upon are contained in two articles written by the defendant Pearson which appeared under his customary by-line in "The Washington Post Times Herald" on December 12, 1961 and February 19, 1962 (18-25; Appendices A & B to the Court of Appeals' decision, reprinted in Appendix D, *infra,* pp. 25a-32a). The first of these articles can only be interpreted as accusing the petitioner of involvement in a recent judicial "bribery scandal" in New York. The plain inference is that the plaintiff was in fact involved, and only escaped prosecution because of his relationship to the then Attorney General of the United States and the late President of the United States. In case any reader might miss the point, the author Pearson juxtaposed this charge with a rehash of certain never-substantiated charges made by him some thirteen years before, to the effect that the plaintiff was in the hire of a foreign government and had been influenced in his actions as a Congressman by monies paid to him by the registered lobbyist for such foreign government (Appendix D, *infra,* pp. 26a-28a).

As supposed corroboration of the columnist's serious charges, the 1961 article contains the untrue assertions that the Congressman who, purportedly for eleven years took no appreciable interest in Spain, suddenly became the "champion" and "spokesman" for Franco and "littered" the Congressional record with statements and editorials favorable to Spain; that the Congressman's supposed new-found interest in Spain in 1949 coincided with the commencement of a relationship between the Congressman

and Franco's lobbyist, Charles Patrick Clark; that the Congressman was in Madrid with Clark during the same year that he is alleged to have changed his attitudes and that, at that time, he was reported to have had $5,000 stolen from him; that Keogh reversed himself and voted in favor of increasing gas rates because of his relationship with Clark who was a lobbyist for a gas pipe line company; that Keogh received certain checks in specific amounts from Clark which were "listed" as payments for legal advice on a tax case; that Keogh had in fact, in violation of conflict of interest statutes, aided Clark in a tax case and was "quizzed by the FBI" with respect thereto (Appendix D, *infra*, pp. 26a-28a).

The second article contains, *inter alia*, the accusation that the plaintiff has made a career of representing the special interests, and goes on to charge that the President of the United States sent word to him to stop representing special interests and start working for the public interest (Appendix D, *infra*, pp. 30a-31a).

The respondent, in its answer, denies that the columns are "libelous of and concerning the plaintiff" and alleges that the matters set forth in the columns are "true in substance" (16, 17).

The petitioner deposed three of the newspaper's employees who were involved in the publication of the columns in issue (26-92). One of those depositions had not been completed at the time that the respondent's motion for summary judgment was submitted and the petitioner never had an opportunity to examine one of the employees who was allegedly responsible for the publication and whose affidavit was submitted by respondent in support of its motion for summary judgment (94-96). The depositions that were taken reveal the absence of any creditable standard of acceptability applied to the articles in question, demonstrate a completely unthinking acceptance of the articles for publication and the lack of any knowledge upon which to base a judgment as to whether the charges

contained in the articles were true or false (58-70, 72-73, 82-84, 87).

Before petitioner had completed the depositions and before rulings could be obtained on numerous questions which respondent's attorney directed witnesses not to answer (74, 75, 78, 85, 88), the respondent moved for summary judgment (93). The motion was predicated on the narrow ground that the rule announced in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) absolved the respondent from any liability on the basis of the affidavits of two of its employees, Wiggins (who had not been produced by respondent for examination) and Paull (whose deposition had not been completed). In their affidavits, Wiggins and Paull simply stated that they had no ill feelings against the petitioner, nor did they know that the defendant Drew Pearson had any ill feelings against the petitioner and that, at the time of publication, they had no reason to suspect that any statements in the articles were false or that Pearson would consciously or recklessly make any untrue statements concerning the Congressman (94-98). Both affiants stated that they "accepted the statements found in those articles as being true" (95, 97). They further stated that Drew Pearson was known to them to have a "reputation for uncovering significant news-worthy items" from his "excellent, confidential sources of information" (95-97). No evidence was presented by the respondent respecting any claimed sources for the defamatory charges made in Pearson's articles. No claim was made on the motion by respondent that the charges contained in the article were true. Respondent totally relied upon its claim that the aforesaid affidavits in which its employees claimed total ignorance of any facts upon which to base a judgment as to whether the matter contained in the articles was false or not, entitled it to judgment.

In opposition to the respondent's motion, the Congressman submitted his own verified affidavit (92-108). In it

he stated that he presented it for the purpose of placing before the Court evidence in support of his conclusions that Pearson's reputation was contrary to that stated by the respondent's affiants and that any reliance put upon the columnist's word was "grossly negligent and reckless". (99). In support of those conclusions, he submitted statements and various reports published in leading and widely disseminated newspapers in which the much discussed and controversial defendant, Drew Pearson, was described as a writer whose "inside stories have the facts wrong side out", and, among other things, that Pearson is a writer whose reputation for accuracy and fairness has always been at a low ebb, that he has been described by two presidents as a liar and that one of his former publishers describes him as the "garbage man of the fourth estate".* That affidavit goes on to set forth widely disseminated admissions made by Pearson himself in a well-known periodical and includes his boastful admissions that President Roosevelt called him a "chronic liar" and that he published false and derogatory stories about the wife and daughter of President Truman (104-106). Petitioner further impeaches the respondent's affidavits by setting forth Pearson's revealing admissions that he personally bears the full liability of defending libel suits brought against newspapers for printing his material and that he, in effect, acts as an insurer for the purpose of buying freedom from normal editorial scrutiny (107-109).

Petitioner maintained below that a question of fact existed on the issue of whether the respondent was in reckless disregard of the truth or falsity of the charges contained in the columns, referring to the serious allega-

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* Pearson sued the publisher for libel and lost. *Pearson* v. *Fairbanks Pub. Co. Inc.*, 413 P. 2d 711 (Sup. Ct. Alaska, 1966). The Court held that there was sufficient evidence to sustain a finding that Pearson's writings "frequently did not conform with facts and were therefore worthless".

tions of wrongdoing contained in the article, evidence of Pearson's reputation for false reporting, the newspaper's having published the articles without having any knowledge regarding the truth or falsity of the charges, the failure to make any attempt at verification, and its not having applied any reasonable standard of acceptability of the article for publication.

In a short memorandum opinion, District Judge Leonard P. Walsh denied the motion on March 25, 1965 (109-110; Appendix B, *infra*, pp. 2a-3a).

Judge Walsh denied the respondent's subsequent motion for reconsideration but amended his previous order to include a certification under 28 U. S. C. 1292(b), and issued an opinion setting forth the reasons for his denial of summary judgment. In substance he applied the rule announced in *New York Times Co.* v. *Sullivan, supra,* to the effect that the petitioner, a public official, must prove actual malice in order to impose liability upon the newspaper for published defamatory statements made about him. That Court applied the standard for proving actual malice that was enunciated in the *Times* case, which standard is that such a defamatory statement must have been made with "knowledge that it was false or with reckless disregard of whether it was false or not" (Appendix C, *infra*, pp. 6a-7a). In arriving at the conclusion that summary judgment should be denied because of the existence of issues of fact as to whether the articles in question were published with malice, as so defined, the Court took into consideration the nature and content of the defamatory statement. Its expressed reasoning was that as defamatory statements become more and more vindictive, cruel and scandalous, they increasingly give cause to the publisher to take care, and that a publisher who disregards the vengeful nature of an article, tends to have disregard for the truth (Appendix C, *infra*, p. 8a).

Expressing doubt as to whether its reasoning comported with the rule announced in New York Times, the Court certified two questions to the Court of Appeals.*

The Court of Appeals for the District of Columbia subsequently granted respondents' motion for permission to bring the interlocutory appeal (120-121).

Rejecting the reasoning of the District Court, the Court of Appeals (in a 2 to 1 decision)** reversed, holding that the petitioner had raised no genuine issue of fact with respect to whether the article had been published with actual malice as defined by this Court in *New York Times*. That Court stated

> "The seriousness of a charge, in itself, is not probative of recklessness with respect to the truth" (Appendix D, *infra*, p. 19a).

The Court of Appeals went on to construe the holding in *Times* as permitting the publication of the most vindictive,

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* The two questions certified by the District Court follow:

"1. Does the new definition of actual malice not only preclude per se presumptions of malice, but also prohibit the drawing of any implication of malice whatsoever from the face of the defamation?

2. Has the Supreme Court afforded an absolute privilege to those who, without knowledge of the false nature of their statements, would seek to criticize a Congressman in his public capacity? (Appendix C, *infra*, pp. 10a-11a).

On the appeal, respondent chose to ignore the second question quoted above. The decision of the Court of Appeals, to the effect that affidavits claiming ignorance are enough to successfully invoke the qualified privilege, is, in practical effect, an affirmative answer to that question.

** Circuit Judge Wright wrote the majority opinion (Appendix D, *infra*, pp. 12a-25a). Judge McGowan wrote a concurring opinion, agreeing with Judge Wright's conclusion and parts I and II of his decision (Appendix D, *infra*, p. 32a). Senior Circuit Judge Miller dissented (Appendix D, *infra*, p. 32a).

cruel and defamatory statements contained in a column written by a syndicated columnist,

> "in the absence of evidence that the publisher had good reason to suspect falsity . . ." (Appendix D, *infra*, p. 25a).

The Court of Appeals rejected the evidence of Pearson's reputation for false reporting offered in the petitioner's affidavit, but stated that even if that evidence were admissible, it did not raise a substantial question of fact on the issue of reputation*. Not finding any other evidence in the record that the respondent had "good reason to suspect falsity," the Court reversed the District Court and granted summary judgment (Appendix D, *infra*, p. 25a).

Reasons for Granting the Writ

The important question of national significance presented in this case is whether the qualified constitutional privilege which has been granted to those who publish defamatory statements about public officials deprives the public official of a remedy if the publisher pleads ignorance of the truth or falsity of the accusations made. The majority of this Court, in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. at 279-280.

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* Circuit Judge McGowan did not concur in that part of Judge Wright's decision in which the latter stated that summary judgment would be granted even if the matter contained in the petitioner's affidavit were admissible. (Appendix D, *infra*, p. 32a.)

The Court has reaffirmed and applied that standard of actual malice in subsequent cases and in varying situations. *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Linn* v. *United Plant Guard Workers of America Local 114, et al.*, 383 U. S. 53 (1966).

The Court of Appeals, erroneously applying that principle, announced a rule which immunizes the publication of the most outrageously defamatory material, when the material is written by a syndicated columnist or anyone else who is not in the employ of the publisher, unless the public official can affirmatively show that the publisher had "good reason to suspect falsity." That decision completely distorts the principles of the *Times* case, and, in practical effect, gives to publishers the absolute immunity from libel suits brought by public officials, which immunity the majority of this Court has specifically refused to grant.*

The District Court below, in denying summary judgment, found substantial evidence that the respondent acted in reckless disregard of the truth in light of the extremely serious charges of wrongdoing and dereliction of duty contained in the articles ** and the fact that the record revealed that respondent published the articles although none of its employees had any knowledge whatsoever upon which to base a judgment that the serious charges contained in them were true or false. The District Court's reasoning in this respect is unassailable.

> "As defamatory statements become more and more vindictive, cruel and scandalous, they increas-

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* See concurring opinions in *New York Times Co.* v. *Sullivan*, 376 U. S. at pp. 254-305.

** Before both the District Court and the Court of Appeals, it has been correctly assumed by respondent that a jury could find that the columns contain the defamatory statements which petitioner claims they contain. See *Clark* v. *Pearson*, 248 F. Supp. 188, 191-2 (D.D.C. 1965), a case based on one of the articles sued upon herein in which it was held that a jury could reasonably find that the article contained a defamatory meaning. See also *Hartmann* v. *American News Co.*, 171 F. 2d 581 (7th Cir. 1948); *Rosenblatt* v. *Baer*, *supra*.

ingly give cause to the printer and publisher to take care. He who tends to disregard the vengeful nature of his printing tends to recklessly have disregard for the truth.

"To hold this position is not to return to the old standard of 'reasonable belief', specifically rejected by the Court in Garrison (at pages 78 and 79). We do not maintain that the Times standard makes publishers responsible for the lack of ordinary care in the editing of syndicated columns; but rather that the standard makes them responsible for recklessness, and that one of the essential ways for determining recklessness is through an investigation of the printed material itself.

"If this interpretation of the Supreme Court's definition is correct, then defendant Post's employees' affidavits of actual ignorance may be insufficient to immunize them from being found to have acted maliciously in publication of this matter. There would be a time in which the publisher would be forced to investigate the truthfulness of obviously defamatory material" (Appendix C, *infra*, p. 8a).

Rejecting this reasoning, the majority of the Court of Appeals limited its search of the evidence to that which might have led the publisher to suspect falsity. That Court stated:

"The most serious charges . . . may be made responsibly, with no hint of anything contrary to common knowledge, while less serious charges may be made rashly, with internal inconsistencies, citing facts contrary to common knowledge. And there is no basis, empirically or in view of *Times*, for the proposition that 'more serious charges' are less likely to be true than 'less serious' charges" (Appendix D, *infra*, pp. 19a-20a).

By so narrowing the scope of relevancy to that which would lead a publisher to suspect falsity, the Court of Appeals has misread the standard of malice enunciated in

Times. This Court did not define actual malice as the reckless disregard *of falsity* but rather as "reckless disregard *of whether it* (the defamatory statement) *was false or not.*" (Emphasis supplied) 376 U. S. at pp. 279-280. The point, therefore, is not that serious charges of wrongdoing by a highly placed public official should give a publisher reason to suspect falsity, or that serious charges are more likely false than innocuous ones, but rather that the severe repercussions regarding the reputation of the official are such that to publish those charges without having some knowledge upon which to base a judgment that the charges are true is evidence upon which a jury could find that the publisher was in reckless disregard of whether the charges were false or not.

Certainly the depositions which had been taken reveal that the respondent's employees disregarded whether the article was false or not. The District Court was clearly correct in holding that a jury could reasonably find that, in view of the serious charges of wrongdoing directed to the Congressman, the respondent's utter disregard of truth or falsity was reckless. The concept of recklessness with the truth has long been part of the law of libel insofar as the proof of such recklessness has been required to overcome a conditional privilege or as a factual basis for the awarding of punitive damages. E.g., *Reynolds* v. *Pegler*, 223 F. 2d 429 (2d Cir. 1955); *Pecue* v. *West*, 233 N. Y. 316, 135 N. E. 515 (1922); *Corrigan* v. *Bobbs Merrill*, 228 N. Y. 67 (1920); *De Ronde* v. *Gaytime Shops*, 239 F. 2d 735 (2d Cir. 1956); *Hogan* v. *New York Times Co.*, 313 F. 2d 354 (2d Cir. 1963); *Prosser On Torts* (3rd Ed., 1964), 821-822. This Court, in *Times*, did not intend to alter the common law standard for reckless disregard of the truth. It has simply extended a qualified privilege which incorporates that concept. Under that common law concept, there is no question but that the character and content of the publication involved is relevant to the issue of whether the publisher was reckless in publishing without knowledge of the truth and without investi-

gation. The reasoning of Judge Medina in *Reynolds* v. *Pegler, supra,* is particularly apt. In upholding an award of punitive damages against the publisher of materials purchased from a news syndicate, he stated:

> "Malice may be inferred from the very violence and vituperation apparent from the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for the purposes of revision, but permitted the publication of the column without investigation, delay or any alteration whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights." 223 F. 2d at p. 434.

If the articles involved in the instant case were written by one of respondent's reporters, petitioner would have redress against the newspaper under principles enunciated in the *Times* case, if he were able to show that the reporter's claimed sources for the article were such that he was reckless with the truth. If the public official is to be denied such an inquiry vis-a-vis the publisher because the article was written by a person not employed by the publisher, such as a syndicated columnist, he should be able to hold the publisher responsible upon a showing that the articles were accepted for publication without any attempt at verification and without bringing to bear any reasonable standard of acceptability for publication, or, indeed, any standard at all.*

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* The assistant World Editor, who was one of the persons who handled the articles in question, testified in his deposition as follows:

> "Q. And when you read the Pearson column, . . . was it your policy to or purpose to check it as to falsity A. Not to check it.
>
> Q. Or was it to formulate an opinion as to whether it was true or false? A. The columns are all true, as far as I know, when they come in, just as a reporter's work.
>
> Q. You mean, you assume them to be true? A. That's right (69).

Unless this Court reverses the decision below, every newspaper will be able effectively to immunize itself from libel suits by simply placing persons of invincible ignorance in positions of responsibility on its staff, * and/or by simply instructing its employees to refrain from reading copy before it is published. In either situation, the employees could then truthfully make the statements contained in the affidavits submitted below in support of the respondent's motion, *i.e.*, that at the time of publication, they had no reason to believe or evidence causing them to suspect that the articles contained any false statements (95, 97). Indeed, under the protection of the rule announced by the Court below a newspaper could, with impunity, publish a syndicated column containing the false and baseless accusation that the President of the United States that day embezzled a million dollars from the national treasury. In accordance with the lower court's reasoning, a publisher would have no "good reason to suspect falsity" because of the absence of any "common knowledge" that the President had not in fact done so. Surely this Court, in *New York Times*, did not intend to obliterate the time honored protection to personality given by the law of libel. To the contrary, it has reaffirmed the view that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer*, 383 U. S. at p. 86.

In holding that the nature and content of the article sued upon is not relevant to the issue of malice, and that a public official cannot hold the publisher of a syndicated column responsible for defamation without showing that the publisher had good reason to suspect falsity, the Court

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* One of the respondent's employees responsible for publication testified in his examination as follows:

"Q. Let me ask you, Mr. Paull; in 1961, at the time that you first saw this article, were you at all aware of the existence of Mr. Keogh? A. I don't know" (84).

below is in conflict with the *Times* case, with other State and Federal Courts, and with a subsequent decision of this Court in which the principles enunciated in *Times* were applied. *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Pape* v. *Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965); *Gilligan* v. *King*, 48 Misc. 2d 212, 264 N. Y. S. 2d 309 (Sup. Ct. N. Y. Co. 1965); *Matassa* v. *Bel*, 246 La. 294, 164 So. 2d 332 (Sup. Ct. La., 1964); *Fignole* v. *Curtis Publishing Co.*, 247 F. Supp. 595, 598 (S. D. N. Y. 1965) (dicta).*

In holding that the evidence presented in the *Times* case was constitutionally insufficient to sustain a finding of actual malice, this Court considered all of the facts attendant on publication, including the nature and content of the material sued upon. It reviewed in detail the evidence with respect to the seriousness of the charges contained in the article, the extent to which the statements in the article were true or false, the reasonableness of the judgment made by the newspaper that the article was substantially accurate, whether the articles were "of and concerning" the plaintiff, the evidence that the newspaper applied (and customarily applied) a reasonable standard for acceptability of advertisements, the reputation of the sponsors of the advertisement, and the publisher's testimony that he knew nothing to cause him to believe that anything in the advertisement was false. 376 U. S. at 285-292. The decision below denies the relevance of all of the evidence reviewed

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* The confusion as to the meaning of the reckless disregard standard, in addition to being evidenced by the conflict with the decisions referred to above is acknowledged in Hanson, Developments in the Law of Libel: Impact of the New York Times Rule, 7 Wm. & Mary L. Rev. 215, 218-219, written by the General Counsel to the American Newspaper Association. See also Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Corn. L. Q. 581, 599-600 (1964).

except the statement of the publisher. In so narrowing the scope of relevancy to evidence of whether the publisher had "good reason to suspect falsity", the Court below has effectively and erroneously subsumed the "reckless disregard" standard under the "knowledge of falsity" standard. The standard of actual malice thus becomes "knowledge or suspicion of falsity."

Arguing that the seriousness of a charge of crime and corruption is not relevant to the issue of recklessness, the Court below claims that the alleged libels in the instant case are "no more serious" than those in *Times* (Appendix D, *infra,* p. 19a). It fails, however, to recognize that this Court found in *Times* that the newspaper's judgment that the statements in the articles were substantially correct was "a reasonable one" and that the plaintiff's proofs tended to corroborate that judgment. 376 U. S. at 286. No such finding was made by the Court below.

In *Rosenblatt* v. *Baer, supra,* this Court also analyzed the nature and content of the article in question, stating:

> "The column on its face contains no clearly actionable statement. Although the questions (in the article) 'What happened to all the money last year? and every other year?' could be read to imply peculation, they could also be read, in context, merely to praise the present administration." 383 U. S. at 79.

Holding that the principles of the *Times* case were applicable, the Court held that

> "(T)he record suggests respondent may be able to present a jury question of malice as . . . defined (in the *Times* case)." *Id.* at 87.

In *Pape* v. *Time, Inc., supra,* reversing an order granting summary judgment to the defendant, the Seventh Circuit held that the sole fact of the rewording by the publisher of a U. S. Civil Rights Commission report so as to

make it appear that the plaintiff did certain acts although the report only indicated that he was charged with doing those acts, was sufficient evidence of recklessness to entitle the plaintiff to a trial on that issue. Contrary to the holding of the Court below, the plaintiff in *Pape* was not required to present evidence that the defendant had any reason to suspect that the statements in the articles were false. Indeed, no such showing was made by the plaintiff in that case. The Court below has cited no case in which such a requirement was made.

In *Gilligan* v. *King, supra,* applying the principles of the *Times* case, the Court there denied a motion to dismiss, stating:

> "'It has been held that actual malice may be inferred from the language and tenor of the libelous statement. . . .'" (264 N. Y. S. 2d at 314).

This important area of the common law of libel over which this Court, in *Times* has superimposed a constitutional limitation, should not be left in the obvious state of confusion which has fostered the conflicting decisions referred to above and the unjust decision below which provides precedential authority for irresponsible reporting. In the interest of the orderly administration of justice, this Court should now resolve those conflicts and dispel the confusion.

The Court of Appeals' reliance on *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231 (W. D. Ky. 1965), appeal pending, 6 Cir., No. 16,999,* is misplaced.

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* The District Court in *Walker, supra,* held that the public official rule enunciated in the *Times* case was applicable to that case, on the theory that although the plaintiff was not an elected or appointed official he was in the forefront of events regarding a public issue of wide interest. In a case based upon the same article, brought by Walker against the Associated Press, the highest court of Texas held that the constitutional limitations enunciated in *Times* did not apply. *The Associated Press* v. *Walker*, 393 S. W. 2d 671, 680 (Court of Civil Appeals, Texas 1965). This Court has granted a petition for

In *Walker, supra,* the defendant published and broadcast certain news items concerning events occurring on the same day on a University campus in Mississippi, having received their items from a national news-gathering agency. The Court there pointed out that the struggle on the Mississippi campus was "one of the major political issues of our time", and that news concerning it possessed a limited lifetime and necessarily had to be published with promptness so that the public be kept informed. In the instant case, however, we are dealing not with current newsworthy items but rather with a columnist's deliberate and baseless fabrication with respect to his personal view of events, most of which occurred more than a decade ago, and none of which involved current news. This Court has taught that "the scope of the privilege is to be determined by reference to the function it serves", *New York Times Co.* v. *Sullivan,* 383 U. S. at 85, note 12. That function is to foster "first, a strong interest in debate on public issues, and second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Id.* at 85. Certainly those purposes are not achieved by the summary dismissal of a libel action in which a high public official seeks to redress an irrespon-

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certiorari in the latter case (35 U. S. L. Week 3110). A petition for certiorari has also been granted in *Curtis Publishing Co.* v. *Butts,* 351 F. 2d 702 (5th Cir. 1965), pet. for cert. granted 35 U. S. L. Week 3110, which involves related questions respecting constitutional limitations on liability in libel actions. A petition for certiorari has been filed in *Pauling* v. *Globe-Democrat Publishing Company,* 362 F. 2d 188 (8th Cir. 1966), pet. for cert. filed Sept. 6, 1966, No. 522, 35 U. S. L. Week 3143. One of the questions presented in that case involves, as in the instant case, the standard for finding actual malice. In *Pauling,* a jury verdict for the defendant was returned. The Circuit Court, while disagreeing with the District Court by holding that the principles of *Times* were applicable to the case, refused to send the case back for a new trial on the issue of malice since the jury had found for the defendant "even on the less stringent standards enunciated by the trial court." 362 F. 2d at 199.

sible attack upon his reputation, where baseless accusations of the commission of various crimes and the prostitution of duty are published by persons who admit that they just assumed that everything stated in the articles containing those accusations was true. The Circuit Court's decision gives no aid to the protection of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. at 270. Rather it encourages the repetition of such irresponsible smear attacks as are the subject matter of this suit and which have no claim to legitimacy in the arena of free debate.*

The affidavit which was submitted in opposition to the motion is directed to the reputation of the columnist (99-108). His reputation was made a substantial issue in this case by virtue of the respondent's reliance on the qualified privilege granted in *New York Times* and by its employees' attempts in their affidavits to establish some rational basis for their unthinking acceptance of Pearson's writings (94-98).** The Court of Appeals held below that the affidavit was inadmissible on the motion, claiming that the petitioner's statements regarding Pearson's reputation and excerpts from books and nationally distributed periodicals which evidence Pearson's reputation for and admissions

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* See Prosser On Torts (3rd Ed. 1964) 822.

** Respondent sought shelter in that part of this Court's opinion in *Times* where, in discussing the application of the newly enunciated principle to the full record before it, the Court noted that the *Times* management relied upon the reputation of the sponsors and signatories of the advertisement. Their good reputation for reliability and truthfulness was one basis for the finding that the *Times* management was not in reckless disregard of the truth for failing to make further inquiry prior to publication. 376 U. S. at 261 ff.

of false reporting,* were hearsay, and that the petitioner failed to append certified copies of the articles and books which were excerpted in the affidavit (Appendix D, *infra*, p. 21a).

Clearly, the affidavit was admissible since testimony of reputation is competent although the witness' own knowledge is limited to what he has learned from extra-judicial declarations, *McCormick on Evidence* 323 (1954 ed.). Contrary to the Court of Appeals holding, the matter was not offered to prove the truth of the assertions made by the extra-judicial declarants, but rather was offered as evidence of reputation. See, 5 *Wigmore On Evidence,* Sec. 1609 at p. 479 (3rd Ed. 1940). The affidavit also proffered published admissions by the columnist himself as to his lack of veracity and his recklessness. Admissions by a party are always admissible. 4 *Wigmore On Evidence,* Sec. 1048, at p. 2 (3rd Ed. 1940).

In moving for summary judgment, respondent assumed the burden of persuasion as to every element of the defense asserted. *Evers* v. *Bausbaum,* 253 F. 2d 356 (D. C. Cir. 1958); 6 Moore's Federal Practice, 2335-2336 (and cases cited therein). The issue of recklessness, being essentially a question involving a state of mind, should have been left for jury determination. *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473 (1962); *White Motor Co.* v. *United States,* 372 U. S. 253, 259 (1963).

To allow a newspaper to avoid liability simply by delegating the function of filling its editorial and news spaces, would allow an absurdly easy escape from the limited responsibility which a publisher now has to see to it that the public receives creditable news. The Court below expresses concern that any requirement that a newspaper

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* Petitioner's attempt during the taking of depositions, to ascertain what respondent's editors knew of Pearson's reputation for veracity, was thwarted by respondent (88).

have some factual basis for publishing highly defamatory matter "would dry up much of the stream of information that finds its way into (Pearson's and his fellow columnist's) hands" (Appendix D, *infra*, p. 25a). Surely a publisher should not, with impunity, be allowed to contribute to the public's drinking from that stream if it is polluted.

The Court of Appeals decision below appears to be based upon its own conclusion with respect to the financial status of the newspaper industry, and its estimation of the high cost to that industry of requiring it to have some reasonable factual basis for the material which it publishes (Appendix D, *infra*, p. 25a). If the expenditure of time and money is necessary in order to negate recklessness, then that expenditure must be made under the principles of *Times*. Moreover, in the absence of having formed a reasoned judgment, based upon prior knowledge or verification, as to the truth of serious accusations made against public officials, newspapers should be responsible for the recklessness of the columnists on whom they wholly rely.

Further illustrative of the confusion in the reasoning of the Court of Appeals is its reliance upon the principles enunciated in *Barr* v. *Matteo*, 360 U. S. 564 (1959) in which it was held that certain public officials are immune from liability for defamatory statements made in the course of their official duties. The decision of the Court below is, in that Court's words, "the other side of that coin" (Appendix D, *infra*, pp. 16a-17a). While the Circuit Court's opinion does achieve symmetry by granting the same immunity to critics of public officials as was granted to those public officials in *Barr*, this Court has specifically stated that the *Times* rule is not tied to the rule of official privilege and that "the public interests protected by the *New York Times* rule are interests in discussion, not retaliation. . . ." *Rosenblatt* v. *Baer*, 383 U. S. at 84-5, note 10. The Circuit Court's view, that publishers have no responsibility for the publication of a columnist's vicious libel so long as the publisher

professes ignorance or unthinking belief, does not go toward strengthening our national commitment to fruitful debate, but rather distorts and abuses it. It was for the purpose of preventing an open season on public officials that the majority of this Court qualified the privilege granted in *Times*. The Court below, by indirection, has aborted that purpose by erroneously transforming that qualified privilege into an absolute immunity. In the exercise of its supervisory powers, this Court should end the confusion which has caused the erroneous decision below, by reaffirming the responsibility of critics of public officials to desist from the reckless publication of defamation.

CONCLUSION

For all the reasons advanced, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions Involved

U. S. CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. CONSTITUTION, AMENDMENT XIV, SEC. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

First Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3788-62

EUGENE J. KEOGH,

Plaintiff,

against

DREW PEARSON

and

THE WASHINGTON POST COMPANY,

Defendants.

Memorandum and Order

This matter came before the Court for hearing on the motion of defendant, Washington Post Company for summary judgment and on its motion to strike plaintiff's opposition to the motion for summary judgment.

The motion to strike is based upon the fact that the opposition was not officially filed until January 22, 1965, one day after time for filing had expired. Though offered for filing on the 21st, the pleading was not entered of record until the following day because it inadvertently had not been signed. This Court interprets the Local Rules of the District Court and Federal Rules of Civil Procedure Rule 11 as leaving to the Court the discretion whether or not to strike a pleading when it has not been

signed. This Court will invoke that discretion to deny the motion to strike.

As to the motion for summary judgment, after consideration of the pleadings, affidavits, argument, and supplemental memoranda presented on the motion, the Court feels that *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), and *Arscott* v. *Washington Post Company*, Civil Action No. 1025-61 (D.D.C., May 20, 1964) can be distinguished from the instant case and do not require a summary judgment here.

In the *Sullivan* case, the plaintiff had an opportunity to present his evidence in court, and in *Garrison*, a criminal libel action, there was also an opportunity to present evidence as to the libel charge. In *Arscott*, there were no affidavits filed in opposition to the motion for summary judgment.

Considering the affidavits of Joseph Paull and of James Wiggins, the partial deposition of Mr. Paull, and the affidavit of Representative Keogh, there is a doubt in the mind of this Court as to the granting of the motion for summary judgment, and when there is a doubt it should be resolved against the moving party, and summary judgment should be denied. 6 *Moore's Federal Practice* 2013.

In accordance with the above, it is by this Court this 25th day of March, 1965

ORDERED, that the motion to strike filed by defendant Washington Post Company be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the motion of defendant Washington Post Company for summary judgment be, and the same hereby is, denied.

LEONARD P. WALSH, *Judge*
s/ Leonard P. Walsh

[Names of Attorneys to whom distributed omitted]

APPENDIX C

Second Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EUGENE J. KEOGH,

Plaintiff,

AGAINST

DREW PEARSON,

and

THE WASHINGTON POST COMPANY,

Defendants.

Memorandum

This matter originally came before this Court on a Motion for Summary Judgment filed on behalf of defendant The Washington Post Company, and also on a Motion to Strike the opposition of plaintiff thereto. The Court denied both motions on March 25, 1965.

Thereafter, on March 29, 1965, defendant Washington Post filed a Motion to Reconsider Denial of Summary Judgment; and defendant Drew Pearson filed a Motion to Reconsider Order of March 25, 1965. Plaintiff filed a Motion to Strike the motion of defendant Pearson. On June 21, 1965, the Court heard argument on all of said motions and the same were submitted.

This is a libel action. Plaintiff is a Member of Congress from the State of New York. Defendant Washington Post is the publisher of a daily and Sunday newspaper in the District of Columbia. Defendant Pearson is a Columnist, whose column, "The Washington Merry-Go-Round" is

widely syndicated by Bell Syndicate, Inc., originally a co-defendant in this action. The Washington Post publishes the Pearson column.

The complaint alleges defendant Washington Post published certain syndicated columns written by defendant Pearson which contained false and defamatory matter which has libeled the plaintiff, and that defendant did so maliciously and with intent to injure the plaintiff. Plaintiff alleges that defendant Washington Post, in publishing the particular columns of defendant Pearson, was grossly negligent and reckless, in view of the nature of the defamatory matter and the writer's reputation among journalists.

I. Defendant Pearson's Motion to Reconsider Order of March 25, 1965; Plaintiff's Motion to Strike Motion of Defendant Pearson.

This cause of action was originally filed on December 6, 1962, and numerous motions and pleadings have been filed by all parties. It is noted that during the time the case has been pending, defendant Pearson has filed a separate answer and individual motions. Prior to his present motion he has filed no pleadings jointly, nor joined in any pleadings filed on behalf of defendant Washington Post.

No motion for summary judgment was filed on behalf of defendant Pearson, nor was he a party to the motion of defendant Washington Post. Had the Court granted Washington Post's motion for summary judgment, defendant Pearson would have remained a party to the action. He suffers no injury by its denial.

Defendant Pearson not being a party to the motion for summary judgment lacks standing to request the court to reconsider its denial.

> "It is settled law that even a party cannot appeal from a decision which is not adverse to him." *Mil-*

gram v. *Loew's Inc.*, 192 F. 2d 579 (3rd Cir., 1951), p. 586; cert. den. 344 U. S. 903 (1952).

Accordingly, plaintiff's Motion to Strike will be granted.

II. Motion to Reconsider Denial of Summary Judgment

This court denied the motion for summary judgment on the ground that there was "doubt . . . as to granting of the motion for summary judgment, and when there is such a doubt it should be resolved against the moving party, and summary judgment should be denied." Defendant Washington Post now requests the Court to amend its order to include a statement that there is involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. If this amendment is granted, the Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from this order pursuant to 28 U. S. C. #1292(b).

Defendant Washington Post, both in its motion for summary judgment and in its instant motion for reconsideration, has maintained that the publication of such matter, when directed against a public figure acting in his official capacity is privileged, and argues that, lacking a showing of actual malice, the defendant Post is entitled to summary judgment as a matter of law. Defendant Post has relied upon the recent cases of *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) and *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).[1] In order to prove actual malice under

[1] Defendant has also relied upon *Arscott* v. *The Washington Post*, Civil Action No. 1025-61 (D. C., D. C., May 1, 1964); *Afro-American Publishing Co.* v. *Jaffe*, No. 18,363 D. C. Circuit, (May 27, 1965); *Gilberg* v. *Goffi*, 251 N. Y. S. 2d 823 (Sup. Ct. App. Div. 1964); and *Schneph* v. *New York Post Co.*, 23 App. Div. 2d 822 (April 22, 1965).

the *New York Times* standard, one must prove that a statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not." (at page 280). The *Garrison* standard is: "false statements made with a high degree of awareness of their probable falsity." (at page 74).

This Court recognizes that these decisions weigh heavily against implying malice from the face of the publication. However we do not believe that the decisions of the Supreme Court forbid such implication.

Defendant cites the decision of Judge Jones of this Court in the *Arscott* case as holding to that effect. (*Arscott* v. *The Washington Post,* Civil Action No. 1025-61), (D. C., D. C., May 1, 1964, decided without opinion). However, we have examined the transcript of that trial and make no such finding.

The Supreme Court has not spoken to this point. It is difficult to read into the decisions an intent that any and all material, no matter how slanderous and defamatory, is now to be held immune from any implications of an intent of malice until such intent is established from outside facts. The standard for malice is not actual ill will. (*Garrison,* p. 78) It is a standard of recklessness with the truth; the Court is concerned with degrees of probable falsity. We recognize that the automatic implication of malice under the prior "libel per se" rules are clearly eliminated in libel cases involving public figures. The Court held in the *Times* case:

> ". . . that the rule of law applied by the Alabama courts [a libel per se statute] is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." (*Times,* page 264.)

However, the elimination of the automatic per se implication of malice does not necessarily preclude any and all implications of malice from being drawn from the face of a defamatory statement. As defamatory statements become more and more vindictive, cruel and scandalous, they increasingly give cause to the printer and publisher to take care. He who tends to disregard the vengeful nature of his printing, tends to recklessly have disregard for the truth.

To hold this position is not to return to the old standard of "reasonable belief," specifically rejected by the Court in *Garrison* (at page 78 and 79). We do not maintain that the *Times* standard makes publishers responsible for the lack of ordinary care in the editing of syndicated columns; but rather that the standard makes them responsible for recklessness, and that one of the essential ways for determining recklessness is through an investigation of the printed material itself.

If this interpretation of the Supreme Court's definition is correct, then defendant Post's employees' affidavits of actual ignorance [2] may be insufficient to immunize them from being found to have acted maliciously in publication of this matter. There would be a time in which the publisher would be forced to investigate the truthfulness of obviously defamatory material.

Whether or not this state was reached in the instant case is a question to be determined at the time of trial unless there is no material variance between this case and

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[2] See affidavits of James Russell Wiggins, Executive Vice President and Editor of The Washington Post Co., and Joseph Paull, Assistant Managing Editor, stating that at the time of publication each man had "no reason to believe or evidence causing me to suspect that the Drew Pearson articles . . . contained any untrue or false statements."

the prior cases cited by the defendant. The prior cases can be distinguished upon the following grounds:

1. In the present case, the defamatory material is directed against a single individual, identified by name. In the *New York Times* case, the plaintiff, Sullivan (Commissioner of Police), was not libeled by name, and specific mention was not even made of the "Commissioner of Police" as such. The only libel alleged was that which was to be implied from criticism of police work within the Commissioner's area of supervision. In *Garrison,* no specific person was libeled; rather, statements were made against eight judges of the Criminal District Court of the Parish in their capacity as judges.

2. The allegations in the instant case are more serious than in the cases cited by defendant. The plaintiff alleges in his complaint that the defendant published one article which "intended to convey that plaintiff had been influenced in his official actions and votes by the receipt of money and that he was implicated in a criminal attempt to bribe a Federal Judge but was spared from prosecution because of his close political associations with the President and the Attorney General of the United States." (Complaint, p. 5), and another article which "intended to convey that plaintiff had been influenced in his actions and votes by the receipt of money and that, for pecuniary gain to himself, the plaintiff championed the causes of special interest groups" (Complaint, p. 7).

If it can be established that plaintiff was, in fact, falsely accused of the acts alleged, he has been more seriously defamed than the plaintiffs in any of the cases cited by the defendant.

3. The Washington Post pays defendant Pearson for the right to run his column. In the *Times* case, the publi-

cation was an advertisement paid for by the Committee to Defend Martin Luther King.

4. The Martin Luther King Committee was a petitioner and an ardent advocate of a cause. A publisher holds Mr. Pearson out to be a reporter of and commentator upon facts.

5. The *Times* petition was endorsed by several prominent persons. Mr. Pearson was writing under his own name.

Thus, the instant case can be distinguished from *Times* and from *Garrison*. Issues of fact are presented here, including the truth or falsity of the statements and the publisher's "recklessness" or "lack of recklessness" in publishing the columns.

For this reason, this Court is of the opinion that the present standard for "actual malice" does not, as a matter of law, dictate the necessity for granting a summary judgment for defendant in this case. However, this Court is aware that there is substantial ground for a difference of opinion as to the law which we have cited in supporting this holding, for, in handling of libel actions the courts have not yet had opportunity to fill in the interstices in the law which have resulted from the recent changes wrought by the *Times* and *Garrison* cases. The law in this area is still indefinite, and there are substantial grounds for differences of opinion upon the following questions of law:

1. Does the new definition of actual malice not only preclude per se presumptions of malice, but also prohibit the drawing of any implication of malice whatsoever from the face of the defamation? If so, the defamatory nature of this publication would be immaterial. Lacking any further proof of actual malice, defendant's affidavits asserting

actual ignorance would be an adequate defense and this matter could be decided by summary judgment as a matter of law.

2. Has the Supreme Court afforded an absolute privilege to those who, without knowledge of the false nature of their statements, would seek to criticize a Congressman acting in his public capacity? The cases maintain that the granting of the privilege is tied to the concurrent privilege of the public figure (*Times*, pages 282-283; *Garrison*, page 74). Representative Keogh's privilege while on the Floor of the House is absolute. (U. S. Const., Art. I, Sect. 6). Does the Court intend a precisely concurrent privilege for his critics? If so, the critic's privilege is also absolute.

This Court recognizes that the *Times* and *Garrison* cases leave substantial grounds for a difference of opinion upon these controlling questions of law. To resolve such differences would materially advance the present case insofar as defendant Washington Post is concerned. Therefore, this Court will amend its Order of March 25, 1965, and thus permit the defendant Washington Post to seek a ruling by the United States Court of Appeals for the District of Columbia Circuit, under the provisions of 28 U. S. C. 1292(b).

Counsel for Defendant Washington Post to submit an appropriate order.

/s/ LEONARD P. WALSH
Leonard P. Walsh, Judge

APPENDIX D

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,668

THE WASHINGTON POST COMPANY, APPELLANT

v.

EUGENE J. KEOGH, APPELLEE

Interlocutory Appeal from the United States District Court for the District of Columbia

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Decided July 28, 1966

Before WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT and McGOWAN, *Circuit Judges.*

WRIGHT, *Circuit Judge:* This appeal presents for consideration in a summary judgment context an application of the public official libel principle enunciated in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). Appellee, a United States Congressman from New York, sued the Washington Post and its syndicated columnist, Drew Pearson, for alleged libelous information appearing in two of Pearson's columns (appendices to this opinion) published in the Post. Without surrendering the defense of truth on the merits, the Post moved for summary judgment on the ground that the record raised no genuine

issue as to actual malice on its part. The District Court, although "aware that there is substantial ground for a difference of opinion as to the law which we have cited in supporting this holding," distinguished *Times*[1] and, *finding itself in "doubt," denied the motion for summary* judgment and certified the case for interlocutory appeal, 28 U.S.C. § 1292(b). *Keogh* v. *Pearson*, D.D.C., 244 F. Supp. 482, 486 (1965). We reverse.

I

The governing rule of law, announced in *New York Times*, is that public officials may sue for libel only when they can demonstrate the statement was made with "actual malice," which is defined to mean publication of false statements with actual knowledge of their falsity or with reckless disregard for their truth or falsity. In *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964), the Court refined its standard, stating that "only those false statements made with the high degree of awareness of their probable

[1] The New York Times was sued for publishing an advertisement criticizing alleged misuse of police power in Alabama and purportedly citing specific instances of police brutality. The advertisement had been sent to the newspaper along with a letter signed by A. Philip Randolph stating that numerous prominent persons had sponsored the advertisement and had authorized use of their names. News stories in the Times' own files would have revealed the falsity and distortion in the advertisement. A call to any of the alleged sponsors would have revealed that their names had been used without permission. But the advertisement was printed without any check against these stories and without any attempt to contact the alleged sponsors. This may have been enough evidence to raise an issue of fact on negligence, but the Court ruled it was a constitutionally impermissible evidentiary basis for a libel prosecution by a public official where the Times' personnel involved had filed affidavits disclaiming any knowledge which should have caused them to believe anything in the advertisement was false.

falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." And in *Henry* v. *Collins*, 380 U. S. 356, 357 (1965), the Court reversed on the *certiorari* papers a judgment based upon an instruction allowing the jury to infer malice from the falsity and libelous nature of a statement, pointing out this instruction allowed the jury to find malice from "intent to inflict harm" rather than from "intent to inflict harm through falsehood."

The obvious purpose of these cases is to create a rule of law more restrictive for public official plaintiffs than the pre-*Times* practice of allowing juries to infer malice from the face of defamatory publications. *E.g.*, *Ross* v. *Esquire, Inc.*, 2 Cir. 94 F. 2d 75, 77 (1938). Malice, under the pre-*Times* practice, was equated with hostility, vindictiveness or negligent disregard of reputation. Under the *Times* test false statements made with these motives alone are not actionable; maliciousness may be shown only through knowledge of falsity or reckless disregard of truth or falsity. It is in light of this standard that the evidence in this case must be examined to determine whether summary judgment should have been granted.

A motion for summary judgment should be granted where it is shown that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. In deciding whether a genuine issue of fact is raised in any case, a number of general considerations are relevant. First, the right to trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence. See *Pierce* v. *Ford Motor Co.*, 4 Cir. 190 F. 2d 910, *cert. denied*, 342 U. S. 887 (1951). This need for care has given rise to the valid generalizations that summary judgment must be denied when there is "doubt"

whether an issue of fact has been raised, and that summary judgment is not unusually appropriate when the issue raised concerns a subjective state of mind.

These generalizations do not, however, relieve courts of their responsibility to decide whether a genuine issue of fact exists. That doubt concerning the issue should be resolved against the movant may assist courts in disposing of troubling cases after deliberation, but it provides no assistance in the deliberative process itself. That state of mind should generally be a jury issue does not mean it should always be so in all contexts,[2] especially

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[2] The proposition that state of mind should generally be a jury issue originated in *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473 (1962), where the Court stated:

> "* * * We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. * * *" (Footnote omitted.)

This statement was re-echoed in *White Motor Co.* v. *United States*, 372 U. S. 253, 259 (1963). Summary judgment had been granted in both cases under an erroneous view of the law. In *Poller* the District Court ruled that, even if the defendant's motive and intent were to violate the Sherman Act, such motive was irrelevant since plaintiff's economic injury was caused by defendant's exercise of its legal rights. D.D.C., 174 F. Supp. 802, 805 (1959). This Court of Appeals affirmed at least partially upon the same reasoning. 109 U. S. App. D. C. 170, 174, 284 F. 2d 599, 603 (1960). In *White Motor Co.* summary judgment was granted on the theory that defendant's actions amounted to a *per se* violation of the Sherman Act. The Supreme Court, in both cases held that motive was relevant. Thus the Court's statements cannot be read as directed at a practice of granting summary judgment too often when motive is relevant, since the error in those cases lay in the legal rule applied by the lower courts. The Court did go on to analyze the evidence in *Poller* and ruled that summary judgment would be inappropriate under the proper legal standard. The evidence there of unlawful intent, however, was far more substantial than in this case. 368 U. S. at 469-473.

where the issue is recklessness, which is ordinarily inferred from objective facts. Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement. Asbill & Snell, *Summary Judgment Under the Federal Rules—When an Issue of Fact is Presented,* 51 MICH. L. REV. 1143, 1144 (1953).

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular cases. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered." *Smith* v. *California,* 361 U. S. 147, 154 (1959).

The Supreme Court has made clear that public officials, including Congressmen, are immune from liability for statements, however false and defamatory, made in the

course of their official duty. *Barr* v. *Matteo*, 360 U. S. 564 (1959). The other side of that coin is that public officials do not have the same protection from libelous statements as private victims. "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." *New York Times Co.* v. *Sullivan, supra*, 376 U. S. at 282-283.[3]

II

The evidence on the motion for summary judgment shows that Pearson has been writing a daily column for many years and that this column is published in more than 600 newspapers with a daily circulation of over forty million. The Post filed depositions of three employees and affidavits by its editor and an assistant managing editor indicating that before publication each of the Post personnel deposing had read one or both of the columns and had no reason to believe or evidence causing them to suspect the information contained in them was false. In opposition Keogh filed the two Pearson columns and his own affidavit. The columns identified Keogh specifically and, according to the complaint, intended to convey that Keogh took bribes which influenced his official actions and votes, and that he had attempted to bribe a federal

[3] In announcing these reciprocal principles the Court recognized that some public officials may be unpopular because of the duties they are required to perform and, consequently, would be susceptible to actions for libel brought against them in an unfavorable climate. The popularity and influence of a public official, on the other hand, may stand him in good stead in any libel action brought in his behalf. See *Garrison* v. *Louisiana, supra*, 379 U. S. at 73-74. Three Justices in both *Garrison* and *Times* felt a person charged with libel by a public official should have the same absolute immunity as the public official when their roles are reversed.

judge "but was spared from prosecution because of his close political association with the President and Attorney General of the United States." Keogh's affidavit neither related to the information contained in the columns nor contradicted the depositions and affidavits of the Post personnel. It attempted to demonstrate, through a series of excerpts from various magazine and newspaper articles, that Pearson's "reputation for accuracy and veracity" is such "that mere reliance upon his word is grossly negligent and reckless."

It is undisputed that no issue of fact exists here as to publication with actual knowledge of falsity. The unimpeached Post personnel depositions are dispositive of this issue. *Orvis* v. *Brickman*, 90 U. S. App. D. C. 266, 196 F. 2d 762 (1952). Rather, Keogh asserts the columns were published with reckless disregard for their truth or falsity. His principal argument on appeal, accepted by the District Court, is that the "character and content of the publication itself" is sufficient to take the case to the jury on acual malice, in light of the Post's failure to check the accuracy of Pearson's columns before publication.[4] The Supreme Court held in *Times*, of course, that the character and content of the publication there involved was a constitutionally impermissible evidentiary basis for a finding of actual malice, even though the Times had failed to verify its contents. Keogh's attempt to distinguish *Times*

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[4] The District Court certified the following question:

"1. Does the new definition of actual malice not only preclude per se presumptions of malice, but also prohibit the drawing of any implication of malice whatsoever from the face of the defamation? If so, the defamatory nature of this publication would be immaterial. Lacking any further proof of actual malice, defendant's affidavits asserting actual ignorance would be an adequate defense and this matter could be decided by summary judgment as a matter of law."

244 F. Supp. at 486.

on grounds that Pearson's columns specifically identified Keogh and that they contained "more serious" allegations than those made in *Times* is unconvincing. There may be some collateral significance in the fact that Pearson's columns specifically identified Keogh,[5] but this fact has no relevance to the Post's recklessness for the truth. If anything, a veiled but obvious reference to an individual in a highly critical context, as in *Times*, may more likely indicate falsity than the same criticism aimed at a specifically identified person. An inference of recklessness from publication should no more be permitted in one case than the other.

Moreover, the alleged libels here are no more serious than those in *Times*, *Garrison* and other cases. The advertisement in *Times* charged police brutality, intimidation, violence, bombing of Dr. Martin Luther King's home, and assault upon Dr. King's person. In *Garrison* the libel charged that all eight of the state criminal district court judges in New Orleans were influenced by racketeers. But even if it were tenable to argue that the charges here are "more serious" than those in *Times*, the seriousness of a charge, in itself, is not probative of recklessness with respect to the truth. The most serious charges, which if anything we have the most reason to avoid deterring, may be made responsibly, with no hint of any-

[5] When an alleged libel is specifically aimed at an identified individual there is no problem of determining whether a statement concerning a group of persons, or otherwise unclear as to whom it refers, should be read to apply specifically to the individual plaintiff. See *Rosenblatt* v. *Baer*, 383 U. S. 75, 80-83 (1966). Specific identification of a defamed individual does not, however, make certification significantly easier than normal, since a statement to be actionable must be "of and concerning" the plaintiff. *Id.* at 80. While specific identification assures that all readers will know who is being attacked, this should properly be a matter relevant to the issue of damages, if the extent of publication is actually affected, rather than a basis for a different standard of libel.

thing contrary to common knowledge, while less serious charges may be made rashly, with internal inconsistencies, citing facts contrary to common knowledge. And there is no basis, empirically or in view of *Times*, for the proposition that "more serious" charges are less likely to be true than "less serious" charges. "No matter how gross the untruth, the *New York Times* rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered 'in reckless disregard of the truth.'" *Rosenblatt* v. *Baer, supra* Note 5, 383 U. S. at 92 (concurring opinion of Mr. Justice Stewart).[6]

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[6] Two other attempted distinctions from *Times* are worthy only of passing mention. First, the District Court pointed out that the Post pays Pearson while the Times was paid to publish the advertisement. If anything, those whom a publisher pays presumably would have more to lose by handing in untruthful defamations than a one-shot advertiser, such as in *Times*. The fact that the Post pays Pearson certainly does not associate the Post with his opinions. Second, "The Martin Luther King Committee was a petitioner and an ardent advocate of a cause," said the District Court, while "[a] publisher holds Mr. Pearson out to be a reporter of and commentator upon facts." 244 F. Supp. at 486. It is common knowledge, in fact, that newspapers often do not share the opinions and views of their commentators, and seldom if ever hold out columnists syndicated in hundreds of other newspapers as anything but individuals stating their own positions. But accepting for now the dubious factual premise that publishers hold out columnists to be reporters of and commentators upon facts, it is difficult to see why a publisher is more reckless of the truth when he prints a regular column without verification than when he prints an advertisement published by "an ardent advocate of a cause." The District Court seems to imply it is somehow less reprehensible to print the untruths of an ardent advocate than of a professional newsman. But even if we indulge the untenable assumption that Pearson and his fellow commentators and newsmen are never themselves ardent advocates of causes, it seems reasonable to argue that an ardent advocate may be more likely to exaggerate, distort and lie than a dispassionate advocate or a non-advocate, and that publishers should be more on guard against untruth in a case like *Times* than in this case.

Finally, Keogh presses the point that his affidavit contains evidence which proves that Pearson's reputation for veracity is such that the jury should have been permitted to decide whether the Post employees, despite their affidavits, should have known better than to print Pearson's columns without verifying his contentions.

The affidavit, however, is clearly inadmisible and appears to have been treated as such by the District Court.[7] Rule 56(e), FED. R. CIV. P., requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admisible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[8] Keogh's affidavit runs afoul of Rule 56(e) in several respects. First, it is not based on personal knowledge, but asserts and relies on the truth of charges about which plaintiff does not claim to know anything. See *Lark* v. *West*, D.D.C., 182 F. Supp. 794, 798 (1960), *affirmed per curiam*, 110 U. S. App. D. C. 157, 289 F. 2d 898, *cert. denied*, 368 U. S. 865 (1961). Second, the affidavit does not set forth facts admissible in evidence, see Rule 43(a), Fed. R. Civ. P., as the allegations are almost all hearsay. *Jameson* v. *Jameson*, 85 U. S. App. D. C. 176, 178, 176 F. 2d 58, 60 (1949) (Clark, J.). Third, sworn or certified copies of all papers referred to in the affidavit are not attached, as the rule requires. *Steven* v. *Roscoe Turner Aeronautical Corporation*, 7 Cir., 324 F. 2d 157 (1963) (public

[7] Although the court mentioned considering the affidavit along with everything else in its original order denying summary judgment, it did not mention the affidavit in its opinion. The question it certified to this court confirms the view that the affidavit was treated as inadmissible. Note 4, *supra*.

[8] See 6 MOORE, FEDERAL PRACTICE ¶ 56.22[1] (2d ed. 1965); 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1237 (Wright ed. 1958).

records); *Allstate Finance Corporation* v. *Zimmerman*, 5 Cir., 296 F. 2d 797 (1961) (other papers). See generally 6 MOORE, *op. cit. supra* Note 8. It cannot, therefore, be relied upon to raise a genuine issue of fact.

III

Even if the affidavit were admissible, or had been treated as such by the District Court as appellant contends, still no genuine issue of fact would be raised. It is true that a publisher has reason to suspect a publication's accuracy where he knows or should know that the author or endorser is persistently inaccurate.[9] But given its broadest possible significance, Keogh's affidavit shows only that Pearson had made erroneous statements on a very few prior occasions, and that he has a controversial reputation.[10]

The significance of this evidence must be judged in light of the relevant standard of law. As the Court indicated in *Times*, evidence offered in a libel case might be sufficient to raise a jury question as to a publisher's negligence but insufficient to raise one as to his actual

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[9] This does not mean, however, that a publisher necessarily takes a chance when he prints without reliance upon an author's or endorser's reputation for veracity. In *Times* there was no proven reliance upon the good reputation of endorsers, since the advertisement was accepted without any verification that the persons listed as sponsors had in fact originated or approved the statements made.

[10] The only story in the affidavit directly related to Pearson's reputation for veracity is anything but convincing. It says Pearson was rated in 1944 by Washington correspondents as top in national influence, but only tenth in "reliability, fairness, ability to analyze the news." This dated appraisal does not indicate where Pearson would have stood on reliability alone, and in any event "tenth" may well be an enviable rating.

malice.[11] Proof of isolated instances of inaccuracy, therefore, in a 35-year career during which Pearson has published well over 10,000 columns, cannot be accorded significance, since the relevant rule of law contemplates that "erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the breathing space they need to survive." *Garrison* v. *Louisiana, supra,* 379 U. S. at 74. Proof of a controversial reputation, even of a reputation for indecency or vulgarity, likewise is irrelevant. "That most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth." *Linn* v. *United Plant Guard Workers,* 383 U. S. 53, 63 (1966). Ours is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan, supra,* 376 U. S. at 270. The actual malice test, designed to give practical effect to this commitment, precludes an issue of fact in this case.[12]

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[11] *New York Times Co.* v. *Sullivan, supra,* 376 U. S. at 288. *Accord,* in a summary judgment context, *Braughton* v. *United Air Lines, Inc.,* W. D. Mo., 189 F. Supp. 137 (1960); *Hufner* v. *Erie R. Co.,* S. D. N. Y., 26 F. Supp. 855 (1939), holding that evidence of ordinary negligence may be valueless when judged in light of the standard of gross or wanton negligence. Also, evidence of some degree of intervention by a principal to control the details of an agent's performance may not necessarily raise a genuine issue of fact over whether the agent is an "employee" rather than an "independent contractor"; the interventions must not be "trivial in amount and character * * *," but "enough to color the whole relation." *Radio City Music Hall Corp.* v. *United States,* 2 Cir., 135 F. 2d 715 (1943) (L. HAND, *J.*).

[12] See *Walker* v. *Courier-Journal and Louisville Times Co.,* W. D. Ky., 246 F. Supp. 231 (1965), *appeal pending,* 6 Cir., No. 16,999; *Arscott* v. *Washington Post Co.,* D. D. C., Civil Action No. 1025-61 (May 20, 1964); *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (1964), *affirmed per curiam,* 15 N. Y. 2d 1023, 260 N. Y. S. 2d 29 (1965); *Schneph* v. *New York Post Corporation,* 23 App. Div. 2d 822, 259 N. Y. S. 2d 775 (1965).

IV

There simply is no convincing, realistic basis for the position that newspapers in circumstances similar to the Post's should bear greater responsibilities of verification than the Supreme Court required of the New York Times, where information available from published articles in the Times' own files "demonstrated the falsity of the allegations." *New York Times Co.* v. *Sullivan, supra,* 276 U. S. at 263. Verification of syndicated news reports and columns is a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible. Thus the newspaper is confronted with the choice of publication without verification or suppression. Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem, made increasingly grave by the implications of this fact for free debate. We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material. The costliness of this process would especially deter less established publishers from taking chances and, since columns such as Pearson's are highly popular attractions, competition with publishers who can afford to verify or to litigate would become even more difficult.[13] It is highly unlikely more-

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[13] The Court has allowed libel suits by employers and unions in state courts, but it recognized that such suits might "dampen the ardor of labor debate and truncate the free discussion envisioned by the Act, * * * might be used as weapons of economic coercion," and might, "in view of the propensity of juries to award excessive damages for defamation, * * * pose a threat to the stability of labor unions and smaller employers." *Linn* v. *United Plant Guard Workers, supra,* 383 U. S. at 64. The *Times* rule was adopted to avoid these dangers.

over, that the form of journalism engaged in by Pearson and other columnists could survive in the face of a rule requiring verification to negate recklessness. Pearson and his fellow columnists seek and often uncover the sensational, relying upon educated instinct, wide knowledge and confidential tips. Verification would be certain to dry up much of the stream of information that finds its way into their hands. Whether or not this would please a number of us is irrelevant. What matters is that a rule requiring verification in the absence of evidence that the publisher had good reason to suspect falsity would curtain substantially a protected form of speech.

Reversed.

APPENDIX A

THE WASHINGTON POST

Tuesday, December 12, 1961

BOB KENNEDY IN EMBARASSING SPOT

By DREW PEARSON

The worst New York judicial bribery scandal in the past quarter of a century illustrates the embarrassing predicament in which the President has put his brother by making him Attorney General.

The details of this scandal were published in this column six weeks ago—Oct. 29—and need not be repeated here.

The important fact which causes embarrassment, however, is that the brother of Judge Vincent J. Keogh, charged with splitting a $35,000 bribe, is Congressman Eugene Keogh. The Congressman was one of the strong workers for John F. Kennedy's nomination at Los Angeles and necessarily was investigated, because of reports that he had been approached by the fixers. Attorney General Kennedy announced that he was not involved.

Newspaper Article

Republicans are bound to point out that in the pre-convention period when Bobby Kennedy was his brother's campaign manager and was working night and day to get him nominated, Congressman Keogh was one of his best supporters. In fact, Keogh was the New York spokesman for the Kennedy forces.

Now, during the investigation of the Keoghs, the man who worked intimately with the judge's brother sits in judgment on a man who helped make his brother's election as President of the United States possible.

This position is fair neither to Attorney General Kennedy nor to Congressman Keogh and is why a campaign manager should not hold the job of Attorney General.

Bobby Kennedy, who didn't really want the job but who has been a good Attorney General, is of course following plenty of precedent. Gen. Eisenhower appointed the former chairman of the Republic National Committee and campaign manager for Governor Dewey, Herbert Brownell, as Attorney General. Mr. Truman appointed Howard McGrath, former chairman of the Democratic National Committee, as Attorney General.

This is because the Attorney General has become the chief political arm of every recent administration. No longer is the Post Office the department that hands out the political plums. Civil Service for postmasters has changed all that. The really big political power, with the right to prosecute or not prosecute, pardon or not pardon, push an income tax case or not push it, is the Justice Department.

SPOKESMAN FOR FRANCO

Latterly Congressman Keogh has won a reputation as President Kennedy's staunchest New York supporter on Capitol Hill. Earlier, he was known as a spokesman for dictator Franco of Spain.

Keogh was elected to Congress in 1938, and for 11 years took no appreciable interest in Spain.

Then suddenly, after 11 silent years in Congress, Keogh became the champion of dictator Franco. He littered the Congressional Record with statements and editorials favorable to Spain.

FRANCO LOBBYIST

This began in 1949. It was in 1949 also that Congressman Keogh was seen frequently in the company of Franco's lobbyist, Charles Patrick Clark, who draws $100,000 annually from the Spanish Embassy.

On Oct. 8, 1949, Congressman Keogh paid a visit to dictator Franco in Madrid. Lobbyist Charles Patrick Clark was in Madrid with him.

Traveling on a Spanish train that night, Congressman Keogh was reported to have had $5000 stolen, together with his pants, when he hung the pants too near a window in a sleeping car.

Prior to 1949, Congressman Keogh opposed the natural gas lobby and voted against the Rizley bill which would have hiked gas rates.

But in 1949, Keogh and Charley Clark, lobbyist for a gas pipeline company as well as for Spain, had become friendly and Keogh reversed himself.

At about this time, Congressman Keogh began to receive a series of checks from lobbyist Charley Clark. They were listed as payments by Clark for legal advice on a tax case which the Federal Government had against Silas E. Chambers of Miami. The first check was dated March 6, 1950, for $1500; another on March 24, 1950, was for $1000; April 5, $500, May 3, $500; and June 1, $1000.

In September, 1950, some months after the checks had passed, I handed the information to the Justice Depart-

ment, whereupon both Keogh and Clark were quizzed by the FBI.

Immediately the Congressman wrote a letter to Clark, dated Oct. 31, 1950, which appeared to be aimed at alibiing his transaction. It stated:

"I have given further consideration to the propriety of my continuing to act as advisory counsel. Therefore, if it meets with your approval, I should ask you to consider that our firm has withdrawn and consider that the fee which you previously paid us will be in full."

According to Keogh, Clark had merely dealt with his New York law firm, Halpin, Keogh, and St. John, not with him. But when Clark was asked how Keogh had earned these fees he explained that Keogh had given very helpful advice.

"Then it was Keogh who advised you in this case?" Clark was asked.

"Yes," was the reply.

APPENDIX B

THE WASHINGTON MERRY-GO-ROUND

THE WASHINGTON POST

Monday, February 19, 1962

TAX REFORM MOVES STIR UP LOBBYISTS

By DREW PEARSON

Nothing brings out the lobbyists on Capitol Hill like tax reforms which miight hit the pocketbook interests.

Once President Kennedy showed he was serious about tightening tax loopholes, lobbyists began swarming through the capitol corridors like tourists at cherry-blossom time.

The savings and loan people, for instance, called a convention in Washington at the same time their tax privileges came up for review by the tax-writing House Ways and Means Committee.

The delegates were turned loose on Capitol Hill to bring pressure on their home-state Congressmen.

Adopting the same tactics, more than 1000 restauranteurs marched upon Washington to protest against cutting down expense-account deductions. They cried to their Congressmen that this proposal would put the champagne-caviar joint out of business.

Pickle producer H. J. Heinz organized a task force of 19 big companies to fight a proposed tax on their overseas subsdiaries. They hired public relations expert Anna Rosenberg, who has important Democratic connections, to mastermind their protests.

Other captains of industry, afraid to trust such an important matter to their hired lobbyists, have made personal pilgrimages to Capitol Hill to bring their influence to bear on the tax writers.

In fact, businessmen, bankers, industrialists, oilmen, and spokesmen for other special interests have been pouring into Washington to take up the cudgels against the tax changes.

Actually, President Kennedy wants to give businessmen a tax break in order to stimulate the economy. He has proposed an 8 per cent tax credit on new plant machinery, which would encourage modernization to meet European competition.

He would also like to step up the depreciation rate by basing it upon the economic, rather than physical, life of manufacturing equipment.

GAPING EXEMPTIONS

These two measures would reduce tax revenue an estimated $2,800,000,000 a year. To make up for the antici-

pated loss, the President has asked Congress to close certain tax loopholes.

The most gaping is the tax exemption granted to savings and loan associations on 12 per cent of their revenues. If they were taxed the same as banks, the Treasury figures they should have paid $800 million in taxes last year. Instead, they paid less than $6 million.

The 44 savings and loan companies in the Greater Washington area, for exmple, paid less than $500 in taxes for the year.

To block Congress from increasing their tax load, the savings and loan boys have mounted a lobbying campaign that surpasses all others. They have wined and dined Congressmen, organized a Nationwide letter-writing campaign.

Glen Troop, chief lobbyist for the U. S. Savings and Loan League, has told Treasury men bluntly: "We intend to beat your brains out."

The restauranteurs have been almost as active in opposing the proposed 50 per cent cut in entertainment expenses that can be written off by businessmen.

They have invited the Congressmen, on whom they have been calling, to dine at their luxury eating places—on the house, of course.

FRIENDLY KEOGH

Both groups have found a champion in Congressman Eugene Keogh, a power on the Ways and Means Committee, who has made a career out of representing the special interests.

A dapper Democrat who represents a "rough and tumble" Brooklyn district, Keogh actually lives outside his district, in the same swank apartment house in which the President's father, old Joe Kennedy, sometimes resides. But Keogh is more than a neighbor. He has close political ties to the Kennedys.

Newspaper Article

The President has sent word to him, however, through White House legislative chief Larry O'Brien to stop representing the special interests and start working for the public interest.

"You've had your fun," O'Brien told him. "Now the President would like you to help him put across his tax reforms."

Meanwhile, almost every company which has an overseas subsidiary has screamed to Congress against the President's plan to tax American companies at home on the profits they make abroad.

By equalizing the tax imbalance, Mr. Kennedy hopes to stop American companies from moving their operations overseas and taking jobs away from American workers.

Despite the Big Business pressure, many Congressmen are worried about this threat to employment. Even Senate Finance Chairman Harry Byrd of Virginia, who usually sides with Big Business, is cautious about opposing the President's plan.

"There is only one thing that terrifies the Congress—unemployment," he declared privately. "Congress will not tolerate unemployment."

Even the President's proposal to grant tax credits to manufacturers for modernizing their equipment is opposed by the U. S. Chamber of Commerce and the National Association of Manufacturers. However, they are losing the support of corporations they represent. The railroad, coal, textile, electronics, and machine tool industries have already endorsed the plan in defiance of the C. of C. and NAM.

Walter Heller, the President's chief economic adviser, suggested to aides that the two business groups are so accustomed to opposing Democratic proposals their attack was probably a reflex action. He said he was reminded of the parents who wheeled their baby around Central Park, stopped at a bench to read the newspapers. The wife

glanced into the buggy and screamed, "My God, we've got the wrong baby!" The husband shushed her. "Don't yell so loud. We've got a better buggy."

The C. of C. and NAM, he said, won't have anything to do with a Democratic baby.

However, the public, which has no lobbyists on Capitol Hill, is taking increased interest in reforming the tax laws.

McGOWAN, *Circuit Judge:* I concur in the result reached by Judge Wright, and in Parts I and II of his opinion. The inadequacies of the Keogh affidavit under Rule 56(e), FED. R. CIV. P., leave the record in a state where there are only the columns themselves to be measured against the unimpeached assertions by the *Post* editorial personnel that they had, on reading the columns prior to publication, no reason to believe that they were false in any respect. This does not suggest a *quantum* of proof remotely approaching "the high degree of awareness of . . . probable falsity demanded by *New York Times* . . .", which the Supreme Court said in *Garrison* was essential to the successful maintenance by public officials of either civil or criminal actions for libel. The question before us essentially is: With the proof in this state, would Keogh have been entitled to get to the jury on the issue of a reckless disregard of the matter of truth or falsity?

Although the circumstances of the Supreme Court's rescue of the New York *Times* from the rigors of the law of libel as it was applied in Alabama have little resemblance to the setting of this case, the Court has appeared to persist in foreshortening very greatly the access of public officials to the jury in defamation claims. In a case like this, where the plaintiff has not made an effective tender of any evidence—other than the alleged libels themselves—bearing upon reckless disregard, I do not believe that the present decisions leave room for what could, at best, be sheer speculation by the jury on that issue.

WILBUR K. MILLER, *Senior Circuit Judge,* dissents.

APPENDIX E

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1965

No. 19,668—Civil 3788-62

THE WASHINGTON POST COMPANY,

Appellant;

v.

EUGENE J. KEOGH,

Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and MCGOWAN, *Circuit Judges*.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed.

Per Circuit Judge WRIGHT.

Dated: July 28, 1966.

Separate opinion by Circuit Judge McGowan concurring in the result and in Parts I and II of Judge Wright's opinion.

Senior Circuit Judge Wilbur K. Miller dissents.

United States Court of Appeals
for the
District of Columbia Circuit

FILED
July 28, 1966

NATHAN J. PAULSON,
Clerk.

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No. 725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

EUGENE J. KEOGH, *Petitioner,*

v.

THE WASHINGTON POST COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 775

EUGENE J. KEOGH, *Petitioner,*

against

THE WASHINGTON POST COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The petition does not include the text of Rule 56 of the Federal Rules of Civil Procedure, the application of which is involved in this case. In relevant part that Rule reads:

> "(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior

to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * *

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

"(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing

the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

* * * *

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

COUNTERSTATEMENT OF THE CASE

Eugene J. Keogh, petitioner herein, has been at all relevant times a member of the United States Congress from the State of New York. On December 6, 1962, petitioner filed this action for libel in the United States District Court for the District of Columbia. JA, pp. 6-12. He alleged the existence of defamatory statements of and concerning him in two "columns" written by defendant Drew Pearson and published in about 600 newspapers including the "Washington Post Times-Herald" published by respondent.

The first article was published on December 12, 1961. JA, pp. 18-21; Petition, Appendix D, pp. 25a-28a. It states that the Attorney General of the United States—then Robert Kennedy—was in the embarrassing position of having to "sit in judgment" on a close political ally, Congressman Keogh, following reports that the Congressman was involved in the same judicial scandal which a few months earlier had resulted in the conviction and imprisonment of the Congressman's brother—a judge in the New York State Courts. The article went on to report that the Attorney General, who was

described as "a good Attorney General," had announced that Congressman Keogh was not involved in the bribery scandal. Additionally, the article discussed, among other things, Congressman Keogh's voting record on natural gas legislation and aid to the Spanish Government and his relationship with a registered lobbyist named Charles Patrick Clark.

Petitioner's theory is that the article contains an implication of wrongdoing. There is nothing in the article, however, which "could only be interpreted" as charging that petitioner was involved in the bribery scandal. Petition, p. 3.

The second article was published in February, 1962. JA, pp. 21-25; Petition, Appendix D, pp. 28a-32a. It discussed President Kennedy's then proposed tax legislation. In mentioning Congressman Keogh, among others, the article stated that the Congressman had made a career out of representing special interests and had been urged by a White House representative to support tax reform.

Petitioner's complaint asks for $2,000,000 in damages for the publication of these two articles.

In May and June, 1963, petitioner deposed defendant Pearson. In October, 1964, petitioner took the depositions of three of respondent's employees. In December, 1964, respondent filed a motion for summary judgment in the District Court. No motion was filed by defendant Pearson.

Respondent's motion for summary judgment relied on the rule announced by this Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), that the constitutional guarantees of freedom of speech prohibit a public official from recovering damages for a defamatory falsehood in the absence of clear and convincing proof

by the official that the statement was made with "actual malice", which the Court defined as knowledge or reckless disregard of falsity.

Respondent contended there was no genuine issue of fact on the question of actual malice, relying upon the various depositions referred to above and upon two affidavits filed with the motion, one by respondent's assistant managing editor, Mr. Joseph Paull, and the other by Mr. James Russell Wiggins, the executive vice-president and editor. JA, pp. 94-98. The affidavits affirm that neither of respondent's officials responsible for publication of the articles knew that either article contained any false statement and that neither official had any evidence causing them to suspect prior to publication that the articles contained any false statement. In his deposition Mr. Paull testified that he recalled reading the December 1961 column for newsworthy content, for sense and accuracy, for libelous content and for style, and that after so reading the article he approved it for publication. He could not specifically recall reading the February column but may have done so. It was Mr. Paull's policy, when reviewing articles for publication, to take steps to ascertain the truthfulness of the statements whenever an article contained anything contrary to Mr. Paull's understanding of the facts. JA, p. 75.

Petitioner conceded that the *Times* rule was applicable but opposed the motion for summary judgment with legal argument and his personal affidavit. The affidavit consisted of an attack upon defendant Pearson's past, making a series of allegations that in 1955 Time Magazine published a story charging that a Pearson article of that era was untrue in part; that in 1944 respondent published a retraction of a statement in a

Pearson article published at that time; that in 1948 Time asserted that a 1944 survey of journalists had rated Pearson the tenth most accurate journalist; that Pearson was criticized in a 1949 article in the Saturday Evening Post; that in 1961 Newsweek reported that Pearson was not "considered a 'final source' in Washington"; that Pearson had been attacked in a 1958 article in a newspaper in Alaska; that in 1956 Pearson published certain statements in the Saturday Evening Post about his controversies with various political figures; and that in 1948 Time asserted that Pearson was not asked for his proof by newspaper editors because they knew he would defend libel cases for them. No copy of any document referred to in the affidavit was attached thereto. JA, pp. 99-108.

The District Court denied respondent's motion in March, 1965 with a short memorandum and order. Petition, Appendix B, pp. 2a-3a. On motion for reconsideration, the District Judge filed a more lengthy opinion and, pursuant to 28 U.S.C. § 1292(b), certified that his decision involved a controlling question of law as to which there was a substantial ground for a difference of opinion and that an immediate appeal might materially advance the ultimate termination on the litigation. Petition, Appendix C, pp. 4a-11a; 244 F. Supp. 482. The principal controlling question certified by the trial court, although not articulated with complete clarity, was whether actual malice could be inferred from the face of articles alone, assuming a jury might find the articles contained serious allegations of misconduct which respondent had not verified independently prior to publication. A timely application for leave to appeal pursuant to 28 U.S.C. § 1292(b)

was granted by the United States Court of Appeals for the District of Columbia Circuit in November, 1965.

Of the three depositions of respondent's employees which petitioner took on October 22, 1964, two were completed on that date and the third deposition, that of Mr. Paull, was adjourned without date by petitioner's attorney pending a ruling on the propriety of directions to the witness not to answer certain questions. JA, p. 92. Although the transcript of the deposition was completed shortly thereafter, no motion to compel answers was made until April 26, 1965, six months after the deposition had been adjourned and one month after summary judgment had been denied. JA, pp. 3-4. At no time during any of the District Court proceedings did petitioner's attorney seek to resume the deposition of Mr. Paull or to begin the deposition of Mr. Wiggins, which petitioner had also scheduled for October 22, 1964. At no time did petitioner request or seek a continuance pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in order to supplement his affidavit, complete the Paull deposition or to conduct any other discovery. Petitioner's motion to compel answers of Mr. Paull was argued in the District Court in August, 1965 at which time petitioner's attorney was directed to file a proposed order that would grant the motion in part and deny it in part. Petitioner's attorney did not file a proposed order until some time after the oral argument in the Court of Appeals in April, 1966.

On July 28, 1966 the Court of Appeals announced its decision reversing the District Court on the denial of summary judgment. The Court of Appeals found nothing in the article itself which, in the light of this

Court's explanations of the *Times* rule, would cause the failure to make an independent verification of the articles constitute evidence of actual malice. The columns in question were found to contain no more serious charges than those in cases in which this Court had found no duty to investigate. The court below held that the seriousness of a charge, by itself, is insufficient to support a finding that publication occurred with knowledge or reckless disregard of falsity. Petition, Appendix D, pp. 19a-20a.

The Court of Appeals further found that petitioner's affidavit was not entitled to consideration because of the failure to comply with Rule 56. One Judge went on to state in the alternative that even if the affidavit had complied with the Rule, it would be insufficient to raise a genuine issue of fact on the question of actual malice.[1]

REASONS FOR DENYING THE WRIT

The decision below is not in conflict with any decision of this Court. It is not in conflict with any decision cited in the petition or known to respondent's counsel of any United States Court of Appeals rendered since *New York Times Co.* v. *Sullivan.*

The decision below *sustains* a claim by respondent of constitutional protection under the First Amendment for published criticism of a United States Congressman—one who is undeniably a public official. Petitioner makes no claim of *denial* of constitutional

[1] The Petition (p. 9) quotes a portion of this alternative statement in a misleading manner so as to suggest erroneously that the quotation is taken from that portion of the opinion in which two judges joined to hold that the mere failure to investigate the article independently was not, standing alone, sufficient evidence of actual malice.

right. He concedes that for present purposes he is a "public official" and that the articles of which he complains are subject to the constitutional rule announced by this Court in the *Times* case.[2]

Stripped of its verbiage and mischaracterizations of the record, the principal point urged in the petition is that this Court should reconsider the definition of actual malice which it has enunciated in five cases in the last two Terms. Petitioner argues that this Court's definition of actual malice goes too far in the direction of restricting libel actions and too far in the direction of promoting unfettered public debate. Petitioner calls upon this Court to renounce the definition of actual malice expressed in *Times* and the four cases that followed, and to accept as the constitutional definition of actual malice the common law test which this Court explicitly rejected in *Henry* v. *Collins*, 380 U.S. 356 (1965).

Petitioner concedes that there is absolutely no evidence to suggest that respondent's employees knew or had any suspicion that the publications in question contained false statements. He argues nevertheless that there is a duty to verify independently "serious charges" before publication, because the "severe repercussions regarding the reputation of the official" if the

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[2] The issues in this case, therefore, are not comparable to the issues in three other cases pending in this Court. Associated Press v. Walker, 87 Sup. Ct. 40, *cert. granted* (question whether *Times* rule applies to comments on retired U.S. general); Curtis Pub. Co. v. Butts, 87 Sup. Ct. 30, *cert. granted* (question whether *Times* rule applies to comment on Athletic Director of State University); Pauling v. Globe-Democrat Pub. Co., No. 522, October Term, 1966 (certiorari petition pending; question whether *Times* rule extends to voluntary participant in public debate).

charges are untrue would entitle a jury to infer the existence of reckless disregard. Petitioner relies upon a series of common law decisions antedating *Times* in which state law, principally in New York, has been interpreted by the lower courts as defining actual malice as "a wanton or reckless indifference to plaintiff's rights." Petition, pp. 12-13.[3]

The test announced by this Court in *Times* is not reckless disregard of *reputation,* but rather publication of a defamatory falsehood

> "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

Subsequently, "reckless disregard" was explained by this Court to mean publication of such false statements with a "high degree of awareness of their probable falsity . . . ." *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

In case after case, this Court has held that the mere fact that a charge was serious—together with a failure

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[3] In the court below, petitioner argued in support of the decision of the District Court that there was a duty to investigate independently serious charges since such charges were *ipso facto* probably false. Apparently that position is now abandoned. As the Court of Appeals pointed out,

> "the seriousness of a charge, in itself, is not probative of recklessness with respect to the truth. The most serious charges, which if anything we have the most reason to avoid deterring, may be made responsibly, with no hint of anything contrary to common knowledge . . . ." Petition, Appendix D, pp. 19a-20a.

As this Court pointed out in *Times,* the Constitution protects all criticisms of public officials, including those which are "vehement, caustic, and sometimes unpleasantly sharp . . . ." 376 U.S. at 270.

to verify independently the truth of that charge—was constitutionally insufficient evidence to raise a genuine issue on the question of actual malice.

In *Times* a jury would have been entitled to infer, as perhaps a jury might be entitled to infer in this case, that the publication in question charged the public official with criminal conduct.[4] Yet the official responsible for accepting the publication in *Times* neither telephoned the listed sponsors of the advertisement to determine whether they had indorsed it nor did he check the accuracy of the advertisement against the news stories in the Times' own files.

Despite the fact that news stories in the Times' own files would have shown the advertisement to be false, this Court held that the failure to discover the misstatements .

> "at most supports a finding of negligence and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 U.S. at 287-88.

The evidence is no different here. It shows (1) a publication that might be found to be defamatory,[5]

[4] Indeed, the trial court in *Times* charged the jury that the publication was libelous per se.

[5] For purposes of the motion for summary judgment respondent did not raise the argument that as a matter of law the publication could not be found to contain some defamatory innuendo. This is not a concession, as petitioner seems to assert, that as a matter of law the publication *is* defamatory. Unlike the *Times* case, there is absolutely no evidence in the present record that any news stories in respondents' own files would indicate any falsity in the columns in question. While truth was not one of the defenses raised by the motion for summary judgment, it is illuminating to note that in a

(2) a failure to verify independently the truth of that publication, and (3) each of the two newspaper officials charged with reviewing the articles before publication "knew nothing to cause him to believe that anything in it was false." 376 U.S. at 261. The absence of any evidence beyond these facts shows that there is no genuine issue of fact on the question of actual malice.

In *Garrison* v. *Louisiana, supra,* the publication complained of was a charge that there were " '. . . interesting questions about the racketeer influences on our eight vacation-minded judges.' " 379 U.S. at 66. This Court did not suggest that there was a higher duty of investigation due to the seriousness of this utterance. It held that the mere failure to have a "just" or "fair reason" for making the utterance was not constitutionally sufficient to show actual malice. Because error is inevitable in free debate, "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." 379 U.S. at 74.

In *Henry* v. *Collins, supra,* the libelous statement constituted the serious charge that the defamed public officials were involved in a "diabolic plot" to deprive the defendant of his civil rights. Consistent with the position of the petitioner in this case, the jury in *Henry* v. *Collins* was charged " '. . . you may infer malice

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companion case the District Court said of the first of the two columns sued upon here:

> "Counsel for the defendant Pearson discussed separately in detail each factual item contained in the article and convincingly demonstrated by reference to depositions, affidavits, and exhibits, that each individual statement was true and accurate." Clark v. Pearson, 248 F. Supp. 188, 191 (D.D.C. 1965).

. . . from the falsity and libelous nature of the statement. . . .' " 380 U.S. at 357. This is precisely the rule petitioner seeks. This Court held that instruction to be in error under the *Times* rule because it would have permitted the jury to find actual malice merely in the intent to inflict harm, whereas *Times* employs the more strict test of calculated use of known falsehood. *Ibid.*

Rosenblatt v. *Baer,* 383 U.S. 75 (1966), is the only case since *Times* in which this Court has suggested there might be sufficient evidence of actual malice to raise a jury question on that issue. The evidence did not consist of a simple failure to verify independently a serious allegation. Rather the evidence consisted of testimony showing that the author of the alleged defamation had been offered, in response to a request in one defamatory publication, the opportunity to investigate the plaintiff's records some twelve days before publishing a further defamation charging that the request had not provoked any response. See *Baer* v. *Rosenblatt,* 203 A.2d 773, 776-78 (N.H. 1964), *reversed,* 383 U.S. 75 (1966).

In *Linn* v. *United Plant Guard Workers of America, Local 114,* 383 U.S. 53 (1966), where this Court applied the principle of *Times* to the context of actions for defamation attacking speech protected by the Labor Act, the suggestion that "grave" defamations should be treated differently from "ordinary" libels was dismissed in a footnote as an inappropriate "artificial characterization." 383 U.S. at 65, n. 7. Contrary to the claim of petitioner that serious charges must be independently verified before publication because of the danger of possible injury to official reputation, this Court said in *Linn*:

"the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth." 383 U.S. at 63.

The lower court decisions relied upon by petitioner are not in conflict with the decision below. In *Pape* v. *Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965), evidence of actual malice was found where the publisher consciously and intentionally rewrote allegations summarized in a report of the Civil Rights Commission as though those allegations were the Commission's established conclusions of fact. No such reckless rewriting by respondent appears in this record. In *Gilligan* v. *King*, 48 Misc. 2d 212, 264 N.Y.S. 2d 309 (Sup. Ct., Trial Term, N.Y. Cty. 1965), the trial court, applying state rules of procedure, denied a motion to dismiss a complaint alleging actual malice. The defendants did not contend or attempt to show that there was an absence of evidence of actual malice. In the present case, the motion for summary judgment pierced the pleadings and asked whether there was any genuine issue of fact to be tried to a jury.

The facts of record show that use of summary judgment procedure in the present case was entirely appropriate and well within the discretion of the lower courts. Petitioner had ample time for discovery. The motion for summary judgment was made two years after the suit began, more than one year after a four-day deposition of defendant Pearson was completed, and two months after several depositions of respondent's employees were taken. Petitioner unfairly insinuates he was not allowed to complete the deposition of Mr. Paull and that a fourth employee, Mr. Wiggins, was not produced for examination. This is sheer fantasy.

Petitioner's attorney adjourned the Paull deposition indefinitely on October 22, 1964, and expressed no interest in taking the deposition of Mr. Wiggins whose deposition was also scheduled for October 22, 1964, and who was available at that time. No effort was made to complete the Paull deposition or to take Mr. Wiggins' deposition at any time until July, 1966, shortly before the Court of Appeals announced its decision. No effort was made to supplement discovery under the procedure outlined in Rule 56(f), Federal Rules of Civil Procedure. After waiting six months before moving to compel answers of Mr. Paull, petitioner waited another ten months—until after the oral argument in the Court of Appeals—to file an order requested by the District Court which only partially granted the motion to compel answers.

Unless there is to be no end to litigation, the use of summary judgment procedures to test the merits of plaintiff's case was perfectly appropriate here.

The petition suggests that, on the merits, the decision below is in conflict with the decisions of other courts applying the *Times* rule. The only conflict of other lower court decisions is with petitioner's contentions, not the ruling below. Numerous cases have correctly interpreted the *Times* rule as precluding a genuine issue of fact on actual malice when the only evidence was a failure to verify independently what some might read as a serious charge. See *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (C.W.D. Ky. 1965), *appeal pending*, No. 16,999 (6th Cir.); *Arscott* v. *Washington Post Co.*, Civil Action No. 1025-61 (D.D.C. May 20, 1964); *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (1964), *aff'd mem.*, 15 N.Y. 2d 1023, 260 N.Y.S. 2d 29 (1965); *Schneph* v. *New*

York Post Corp., 23 App. Div. 2d 822, 259 N.Y.S. 2d 775 (1965) (*aff'd mem.* N.Y.L.J. Nov. 23, 1964).

In *New York Times Co.* v. *Connor*, No. 22362 (5th Cir. Aug. 4, 1966), the Court found no evidence of actual malice, explaining:

> "All that the evidence reveals is that Salisbury relied on one or two persons for each statement and that some of these people were actively involved in the events which were the subject of the article. This certainly does not constitute 'reckless disregard for the truth.' Although accuracy and objectivity in reporting are goals for which all responsible news media strive, the protection of the First Amendment is not limited to statements whose validity are beyond question or which reflect an objective picture of the reported events. While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." Slip opinion, at 21-22.

In *Pauling* v. *National Review, Inc.* 269 N.Y.S. 2d 11 (1966) the court held the *Times* privilege applicable and dismissed the complaint at the close of plaintiff's case stating:

> "Plaintiff argues that he has shown 'reckless disregard' by the defendants of whether the article 'was false or not'. But all the plaintiff's evidence on this phase of the case amounts to, giving it the most favorable inferences, is that defendants re-

> lied on unreliable sources, and that if they had checked in a reasonable manner, they would have ascertained that their statements were false. Assuming these facts to be true, that is still not a showing of 'reckles disregard of whether it was false or not', in the New York Times v. Sullivan sense.'"

Petitioner in sum attacks not the decision below but rather the *Times* case itself and all the cases following it. Petitioner argues that unless serious charges have been independently verified, a jury is entitled to infer actual malice,[6] and that without such a rule newspapers will employ "persons of invincible ignorance in positions of responsibility" who will never have a suspicion of falsity and therefore will never call for an independent verification. Petition, p. 14.[7] There will be time enough for this Court to deal with such far-fetched hypothetical cases—should one ever arise. In the meanwhile, it suffices to say that newspapers have concerns that lead them to read what is offered for

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[6] The argument contains a bootstrap element which petitioner seeks to slide over by repeatedly characterizing the article as vindictive, cruel, and defamatory. Just as in Rosenblatt v. Baer, *supra*, the columns in the present case contain "no clearly actionable statement." 383 U.S. at 79. A jury would, under the rule advocated by petitioner, first have to find that it accepts the unfavorable interpretation of the publication and then further find that the publisher's failure to adopt the same interpretation and to verify it constituted actual malice.

[7] The petition accuses Mr. Paull of being such a person by insinuating that Mr. Paull testified that at the time of publication he had never heard of Congressman Keogh. Petition, p. 14, n. * When read in context, it is clear that all Mr. Paull was saying was that in 1964 at the time of the deposition he could not recall whether, in 1961, he had heard of petitioner.

publication in addition to the fear of possible libel suits. This Court may reasonably assume that any newspaper employing invincibly ignorant editors would not stay in business for long. More importantly, the duty to verify which petitioner seeks to impose would seriously curtail the very "uninhibited, robust, and wide-open" debate the *Times* rule was intended to promote. 376 U.S. at 270. As Judge Wright effectively stated below:

> "Verification of syndicated news reports and columns is a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible. Thus the newspaper is confronted with the choice of publication without verification or suppression. . . . We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material. . . . Pearson and his fellow columnists seek and often uncover the sensational, relying upon educated instinct, wide knowledge and confidential tips. Verification would be certain to dry up much of the stream of information that finds it way into their hands. Whether or not this would please a number of us is irrelevant. What matters is that a rule requiring verification in the absence of evidence that the publisher had good reason to suspect falsity would curtail substantially a protected form of speech." Petition, Appendix D, pp. 24a-25a.

Awareness of the basic premise of the *Times* decision, and of the interpretation and several explanations of that decision by this Court, led the court below to order summary judgment after finding that no genuine issue of fact existed.[8] The court was mindful also of this Court's admonitions regarding the care to be exercised in employing summary judgment (see Petition, Appendix D, pp. 14a-16a) and made its decision only after a careful review of the facts and law. There is no sound reason for disturbing that decision.

* * * *

In addition to his principal contention that the *Times* definition of actual malice should be modified, petitioner argues that a genuine issue of fact was raised by the affidavit he filed in the District Court.

The District Court placed no reliance on this affidavit in its final opinion. If it had relied upon the affidavit, it surely would not have certified as a controlling question of law the issue whether the article on its face could be taken as evidence of malice. The Court of Appeals held that the affidavit was inadmissible because it did not conform to the requirements of Rule 56(e) in that (1) it was not based upon personal knowledge, (2) it did not set forth facts admissible in evidence and (3) there were no sworn or certified copies of any of

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[8] Another "reason" offered by petitioner for changing the *Times* standard is that there should be a higher duty to investigate the works of a syndicated columnist *because* under local law the newspaper is not held vicariously liable for the columnist's actions. It suffices to note that no higher duty was imposed in *Times* where an advertiser was involved and for whom the newspaper would have no vicarious responsibility.

the various documents referred to in the affidavit attached thereto.

As Judge McGowan correctly noted, the ruling by the Court of Appeals that the affidavit was not entitled to consideration obviates the need to rule on the further question of whether, under the *Times* principle, the affidavit gave rise to a genuine issue of fact. Accordingly, unless the ruling on the affidavit by the Court of Appeals is erroneous, which it clearly is not, this Court has no occasion to resolve the question whether a few unproved charges against a columnist, some as many as 20 years old and none of which were shown to be within the knowledge of respondent's officers at the time of publication of the columns in question, raise a genuine issue of fact on the question of actual malice.[9]

Clearly there is no occasion to review the question of whether the affidavit violates Rule 56(e). Petitioner has offered no excuse for the failure to comply with the rule. The insistence of the District Court and of the Court of Appeals on procedural regularity hardly raises an issue this Court ought to review. And unless that question is reviewed, there is simply no occasion to proceed further.

With regard to the failure to comply in other respects with Rule 56(e), petitioner argues that (1) the hearsay

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[9] If this question were to be reached, the reasoning expressed in Judge Wright's alternative statement is surely most persuasive. When all is said and done, petitioner's argument is simply that it is per se evidence of actual malice to publish *anything* by Drew Pearson without independent verification, the asserted reason being that Pearson is controversial. Surely Pearson's controversies, some 15 in the affidavit out of a journalistic career of over 30 years and 11,000 columns, cannot deprive his statements of the same constitutional protection that is accorded more timid columnists. *Cf.* Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

in the affidavit was admissible as evidence of reputation and (2) the supposed statements of Pearson quoted in the affidavit were admissible as admissions by a party. These contentions raise questions regarding the local District of Columbia law of evidence, and hence do not call for this Court's time. They are, morever, completely devoid of merit. The alleged admissions of defendant Pearson would not be admissible against the Post. The asserted specific acts of supposed inaccuracy in remote years in Pearson's past—involving matters wholly unrelated to the present case—are not admissible evidence. *E.g.*, 1 Wigmore, *Evidence* § 64 (3d ed. 1940); McCormick, *Evidence*, § 155 (1954).

Petitioner makes a scattering of other arguments, together with numerous unfair characterizations of the record that approach serious misstatements of the facts.[10] No extended reply seems necessary.

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[10] To cite but one example, in arguing that respondent had no "standard at all" for deciding whether to publish syndicated columns, petitioner cites certain testimony by one employee who petitioner's attorney well knows had no editorial responsibility—that responsibility being vested in Messrs. Wiggins and Paull. See Petition, p. 13, n. *. See J.A., pp. 60, 75, 95, 97. The employee quoted out of context by petitioner further testified that while his delegated function was not reading for accuracy, he would not pass a story which contained anything he recognized to be untrue. See J.A., p. 70.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966

No. 725

EUGENE J. KEOGH,

Petitioner,

against

THE WASHINGTON POST CO.,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1966

No. 725

EUGENE J. KEOGH,

Petitioner,

against

THE WASHINGTON POST CO.,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Rather than serving to clarify the basic issues presented in the Petition, Respondent avoids those issues by mischaracterizing Petitioner's position, focusing on extraneous matter and refusing to acknowledge an obvious conflict in the decisions which has engendered wide-scale confusion as to the extent of a newspaper's responsibility when publishing articles written by columnists not in the newspaper's employ.

Contrary to Respondent's statement, Petitioner is not requesting the Court to "reconsider" or "renounce" the principles enunciated in *New York Times* v. *Sullivan*, 376 U.S. 356 (1964). Rather, the issue presented is the meaning of this Court's definition of "actual malice", the proof of which was held to be necessary to establish liability for defamation of a public official. Respondent, agreeing with the majority of the Court below, contends that a newspaper can print the most outrageous lie about a public official so long as the newspaper's employees who handle the article

maintain that they have no personal knowledge which should have led them to suspect that the statements in the article were false. That argument is, in effect, a claim that the *Times* case has so altered the law of libel that the extent of protection now given to a public official's reputation is dependent upon and directly proportionate to the knowledgeability of the newspapers' employees. Respondent characterizes as a "far-fetched hypothetical" the suggestion that invincibly ignorant editors could immunize a newspaper's publication of a columnist's slurs. Indeed, that is the situation here presented, the incomplete depositions * having revealed that the employees responsible for the publication of the instant articles were completely ignorant regarding the subject matter of the article. Respondent further argues that a showing that its employees were completely ignorant of the truth or falsity of such serious charges is not sufficient evidence to raise a genuine issue of fact as to whether the publisher was in reckless disregard of whether the charges were false or not. Respondent does not deny that the evidence adduced demonstrated that it disregarded any question of truth but contends that the seriousness of the charges in the articles is not in any way relevant to whether that disregard of truth or falsity was reckless.

Respondent repeatedly refers to its employees' affidavits wherein they state that they had no evidence to cause them to suspect that the articles contained any false statements. More importantly, Respondent fails to acknowledge that its employees had no reason to believe that the articles were true.

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* Respondent claims that Petitioner could have sought relief pursuant to Rule 56(f) to complete the depositions and to depose Wiggins whose affidavit was submitted by Respondent. The record reveals that Petitioner did emphasize to both the District Court, which denied Respondent's motion, and to the Court of Appeals, which granted it, that discovery had not been completed.

Respondent's brief in opposition would have it appear that the articles complained of merely "report" that the petitioning congressman was not involved in a judicial scandal in which his brother, a judge, was convicted and imprisoned a "few months earlier" and that the articles reported the congressman's "voting record on natural gas legislation and aid to the Spanish Government and his relationship with a registered lobbyist". That is clearly a distortion of the true facts. The articles complained of are dated December 12, 1961 and February 19, 1962. The trial and conviction referred to was not a few months earlier, but in fact in May and June of 1962. The voting record referred to was in 1949 and 1950, some 11 years prior to the articles. It is obvious that respondent's effort at distortion is to create a picture which might properly fit into the frame for those situations where the courts have sought, in the interest of reporting daily news, to overlook inadvertent errors, the verification of which might delay the dissemination of current news of vital public interest. The articles rather than being as innocuous as respondent claims, clearly depict the picture of a congressman let off the hook because of his relationship with the President, the then Attorney General's brother. Unless anyone might think that he was in fact not involved with the alleged bribery, the articles claim that the congressman voted for certain legislation because of an illicit monetary relationship between himself and the registered lobbyist for Spain and the other interests involved in the legislation. In achieving this, the articles further distorts not only plaintiff's voting record but the very issues involved in the legislation. Petitioner is depicted not only as a traitor to his Country and to the best interests of his constituents, but the history of our national relationship with Spain is distorted. In any event, Respondent has conceded below and has conceded for the purposes of this application, that the articles are defamatory.

Respondent infers that because Pearson has written a lot of columns over a long period of time,* it was justified in disregarding whether the articles were false or not. Petitioner's affidavit, on the other hand, reveals that the newspaper's knowledge respecting Pearson's career in which his penchant for false reporting and speculation based on little or no facts was apparent, constituted further evidence that the newspaper's unquestioning publication of the articles in suit was reckless.

Pointing to the fact that the advertisement involved in the *Times* case charged wrongdoing which was as serious as that charged in the articles in suit, Respondent, as did the majority of the Court of Appeals, ignored this Court's specific finding in *Times* that the allegations of wrongdoing were substantially true and that the judgment of the Times' editor based on his prior knowledge of the facts, that the matter contained in the advertisement was true, was a reasonable one. The plaintiff in *Times* would certainly have been entitled to a trial on the issue of recklessness if the charges in the advertisement were completely false, were fabricated by the author of the advertisement and if the Times' editor was completely ignorant of the matter. That is precisely the posture of the case at bar.

Contrary to Respondent's claim, Petitioner does not urge a rule which would require "independent verification" by a newspaper. That phrase, used repeatedly by Respondent, assumes that the columnist has previously verified his accusations and suggests unnecessary duplication of effort. Rather, Petitioner contends that a publisher should bear responsibility where it wholly relies upon a columnist and publishes a column in which fabricated or recklessly concocted charges of crime and corruption appear. On its motion for summary judgment, Respondent presented no evidence whatsoever in support of its present theory regarding "independent verification". Respondent's theory

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* The record contains absolutely no evidence for such statements which are made in both the Respondent's brief and the majority opinion below, Appendix D, p. 17a.

below was that, irrespective of whether Pearson fabricated the charges or was reckless in making them, it was not responsible since none of its employees handling the article knew that the charges were false. That is the substance of the decision of the court below.

Respondent's position is, in effect, that a newspaper's responsibility is dependent upon the financial arrangement between it and the writer of the article. Respondent admits to the exercise of the same control and editorial scrutiny of the work of both reporter and syndicated columnist. See Resp. brief, p. 5, J.A. 69. It is an irrational rule which would make newspapers responsible for the recklessness and fabrications of its reporters but not their columnists because one is on the publisher's payroll and the other's articles are purchased.

Respondent cites numerous cases which purportedly support its claim that a newspaper may with impunity disregard whether a serious charge of wrongdoing is false or not, so long as its employees have no reason to suspect falsity. In none of the cases cited was that proposition even remotely involved. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) this Court held that a criminal statute incorporated constitutionally invalid standards in the context of criticism of the official conduct of public officials. Nothing in that case supports the proposition accepted by the Court below, that the content of the libel is not relevant in determining whether actual malice motivated publication. Indeed, the defendant in *Garrison* may have been liable for damages or criminally responsible for publishing the serious defamatory statements there involved, upon proper jury instructions as to actual malice.

In *Henry* v. *Collins*, 380 U.S. 356 (1965), this Court reversed a jury award on the certiorari petition, for the reason that the jury charge given in that case permitted a finding of actual malice merely from an intent to inflict harm, rather than an intent to inflict harm through falsehood. Contrary to Respondent's claim, the Court expressed

no view as to whether on proper instructions the evidence would have sustained a jury verdict for plaintiff.

Respondent's reference to *Linn* v. *United Plant Guard Workers of America Local 114*, 383 U.S. 53 (1966) at p. 13 of its brief is misleading. This Court, at p. 383 U.S. at 65, n. 7, rejected the government's argument that the purposes of the National Labor Relations Act could only be fullfilled by limiting liability to those situations in which "grave" defamations were published during a union organizing campaign. The Court was not commenting on whether the seriousness of a libel could be properly considered in deciding whether a newspaper was in reckless disregard of the truth by publishing it in ignorance.

Neither does *Gilberg* v. *Goffi*, 21 A.D. 2d 517, 251 N.Y.S. 2d 823 (1964) aff'd per curiam, 15 N.Y. 2d 1024, 260 N.Y.S. 2d 229 (1965) support the decision below. The key to *Gilberg* is "that the alleged defamatory words . . . contain no direct reference to plaintiff . . ." 251 N.Y.S. 2d at p. 829. Upon this finding, summary judgment was properly awarded to defendant. That case has no application to the issues here involved, except to the extent that it reaffirms Petitioner's view as to the limited scope of the *Times* privilege and points up the importance of the fact that in the instant case the libel is clearly directed to the Petitioner.

In *New York Times* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966), judgment was awarded to defendant after a trial in which it was demonstrated that "every challenged statement has been traced to an identified source". 365 F. 2d at p. 576. Respondent made no such showing but merely offered proof that it was ignorant of the facts.

In *Pauling* v. *National Review, Inc.*, 269 N.Y.S. 2d 11 (Sup. Ct. N.Y. Co. 1966), the trial court, after reviewing a "voluminous record", held for the defendant, after finding that the only real accusation that could be found to be directed to the plaintiff, was followed by an admis-

sion in the article itself that there was "no legal evidence to support the charge" 269 N.Y.S. 2d at p. 19. That Court did not hold that an utter disregard for the truth of very serious charges of specific crimes allegedly committed by a named public official was or was not evidence of actual malice, nor did it hold, as Respondent argues, that a publisher is automatically entitled to summary judgment upon a claim of ignorance or unthinking belief.*

Respondent contends that *Pape* v. *Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965) cert. denied 384 U.S. 909 (1966) is not in conflict with the decision below because there purportedly was evidence in that case of "reckless rewriting" by the publisher. Rather, the Circuit Court held that the rewriting was "at least negligent" and that considering that a jury could read the article as containing a serious defamation, the publisher may have been reckless. That is exactly the reasoning which the Court below has rejected. See also, *Gilligan* v. *King*, 48 Misc. 2d 212, 264 N.Y.S. 2d 309 (Sup. Ct. N. Y. Co. 1965).

The fact is that no court has recognized or applied the rule announced in the majority opinion of the Court of Appeals below. The courts which have considered the question have agreed with the District Court below.**

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* Other cases cited by Respondent which require only passing comment are *Arscott* v. *Washington Post Co.*, Civil Action No. 1025-61 (D.D.C. May 20, 1964) which is not reported officially or unofficially. The District Court, after examining the file in that case, stated that it does not stand for the proposition that serious defamatory accusations can never be evidence of malice (JA 114). *Schneph* v. *New York Post Corp.*, 23 App. Div. 2d 822, 259 N.Y.S. 2d 775 (1965) is a memorandum opinion in which neither the facts nor the holding is set forth.

** See Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 657, 658 in which that commentator states that

"Some lower courts have held that very serious charges of specific crimes in themselves constitute some evidence of actual malice but whether this will be accepted by the Supreme Court remains to be seen".

The decision of the Court of Appeals subjects the reputation of responsible public officials to the whim and uncontrolled imagination of anyone who, for pleasure or profit, would seek to malign that reputation by fabrication or reckless accusation. Certainly the salutary goals of free expression and unfettered debate do not require such an obliteration of the time-honored protection to one's good name which has traditionally been afforded by the law of libel.

CONCLUSION

For all the reasons advanced, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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